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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

THE Mid-Winter Meeting of the Executive Committee of the International Association of Insurance Counsel is the time and the place where the great majority of the problems confronting our Association are considered and determined. These meetings are open to members and I hope that you will join us on the 22nd, 23rd and 24th of February, 1950, at the Palm Beach Biltmore, Palm Beach, Florida. Special rates are available to our members, which will include a few days before and after our scheduled meeting. Make your reservations direct with Mr. James J. Farrell, Manager of the Palm Beach Biltmore. Be sure to mention the International Association of Insurance Counsel when making reservations.

Members of the Executive Committee living in the middlewest have reserved a room car for exclusive occupancy on the Chicago & Eastern Illinois Railroad. "Dixie Flagler," leaving Chicago at 10:00 A. M. on the 19th day of February, arriving at Palm Beach, Florida the next day at 5:00 P. M. Any members who wish to go down on the special car should notify me promptly of the space desired and the number in your party. I'll do my utmost to take care of your request.

The Executive Committee endeavors to carry out the wishes of the membership. Oftentimes members disagree on policies, procedure, place and time of our annual convention, or want matters changed, modified, or what-no—well, here's one way to do it. On or before February 10, 1950, write your President any suggestions for clarification, modification or change in the affairs of the Association so your suggestions or recommendations can be put on the agenda for the Mid-Winter Meeting. You must give your duly

elected officers and committee members an opportunity to consider any suggestions you may have to make. In other words, here's your chance to "gripe," provided you have something to "gripe about."

A report of the action taken at the Mid-Winter Meeting will appear in the next issue of the Journal.

Your Association is desirous of adding to our Membership Roster able and outstanding men engaged in the practice of insurance law. There is a requirement that applicants must have been actively engaged in the practice of insurance law for at least five years preceding application for membership. Failure to adhere to this, in the past, has been a source of some embarrassment to sponsors. Always keep foremost in your minds when sponsoring applicants that the desire of the International Association of Insurance Counsel for membership is "Quality and not Quantity."

Your President and our able, resourceful, energetic Chairman of the General Entertainment Committee, L. J. (Pat) Carey, both welcome suggestions as to speakers, type of talks and type of entertainment you desire for our 1950 Convention. The attention of the committee chairmen and members is called to the fact that "Time Marches On" and before long our Convention at The Greenbrier will be here. A number of committees, I am pleased to say, are seriously at work. I hope by the time this Journal appears on your desk, the work of all committees is progressing.

Again, if you have any suggestions for improvement in the management of the affairs of the Association, let me have them in writing before February 10, 1950, and I assure you they will be considered at the Mid-Winter Meeting.

L. DUNCAN LLOYD, *President.*

ANNOUNCEMENT

By Wayne Stichter, *Chairman*

MEMBERSHIP ELIGIBILITY COMMITTEE

At the mid-winter meeting at Palm Beach the Executive Committee adopted the following recommendations of the Membership Eligibility Committee:

"a. That there be no balloting by the Executive Committee at the Annual Meeting or within three weeks preceding such Annual Meeting."

"d. That there be published in each January issue of the Journal a notice advising the membership that no application for membership can be balloted upon before the Annual Meeting unless such application, in writing, is filed with the Secretary at least 90 days before such Annual Meeting; and that all applications not so filed will lay over until after the Annual Meeting has adjourned."

At the Executive Committee meeting of July 1, 1949, "it was unanimously agreed that the Secretary and the Membership Eligibility Committee agree upon what portion of the report should be printed in the January issue of the Journal so that the membership might be apprised, particularly of the fact that no application can be acted upon by the Executive Committee within thirty days (three weeks?) prior to the annual convention or at the annual convention."

Attention—Members

In order that the roster, which will be a part of the April, 1950, issue of the Journal, be as accurate as possible, request is made of each member to check his name in the April, 1949, Journal and if there has been any change in either the address, firm name or company, or if any inaccuracy is found, please give notice of desired change to the offices of the Secretary, the Treasurer and the Editor before February 15, 1950.

1950 ANNUAL MEETING

The 1950 annual convention will be held at The Greenbrier, White Sulphur Springs, West Virginia, on July 6, 7 and 8. Rooms will be assigned in order of receipt of application. To date approximately six hundred requests for reservations have been made. All members requesting reservations who cannot secure them at The Greenbrier will be taken care of adequately in nearby hotels, with transportation facilities day and night. During the day and at night members who so desire may use the dining room and other facilities of The Greenbrier.

ERRATA

On Page 323 of the October, 1949, issue of Insurance Counsel Journal, in the report of the Legislative Advisory Committee, it appears that bills authorizing complete multiple lines underwriting were enacted in New York, as well as in Maine, Ohio, Oklahoma and Pennsylvania. It has been called to my attention that at the eleventh hour the bill failed to pass in Ohio, and there is therefore no such law in effect in that state.

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Nashville, Tennessee

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OPEN FORUM

Annual Meeting of International Association of Insurance Counsel
Chairman: WAYNE E. STICHTER, *Toledo, Ohio*

Practice and Procedure Committee

Moderator: HUBERT S. LIPSCOMB, *Jackson, Mississippi*

SUBJECT: DISCOVERY PRACTICE IN THE FEDERAL COURTS

WEDNESDAY AFTERNOON SESSION
June 29, 1949

PRESIDENT GRUBB: It is a privilege to present our Open Forums Chairman, Wayne Stichter, who will have charge of the meeting from now on. Wayne. (Applause).

. . . Mr. Wayne E. Stichter assumed the Chair . . .

CHAIRMAN STICHTER: We don't have the quantity here but we have the quality, at least.

The Open Forum this afternoon deals with the subject of "Discovery Practice in the Federal Courts." I am very happy about the selection of the subject matter for discussion, the general subject matter as well as the subject matters that will be discussed by these three men, and I am particularly happy about the selection of the individuals who will present these papers and who will conduct this Open Forum.

This subject today is one, of course, that we have talked and talked and talked about, and most of the talk has been directed to criticism of the discovery practice rules and to criticism of *Hickman v. Taylor*. Today we decided that we would approach the matter a little differently. We might as well recognize that for a while, at least, the Federal Rules of Discovery as they now are, are going to be with us, and the effect of *Hickman v. Taylor* is going to be with us for a while. We shall have to deal with these Federal Rules as they are; we have got to live with them. What are we going to do about them?

We shall present to you today a practical, down-to-earth discussion of these Discovery Rules—something that will be of help to each and every one of you in your daily practice in the Federal courts, and I hope that when these papers have been concluded all of you will participate in the panel discussion.

While Mr. Betts is getting his camera I would like to ask you gentlemen and ladies, too, to move down and fill up these front seats. I think it would help you to hear, I think it would help the speakers, and that will be particularly true when we come to the discussion period. So just move forward, please. These seats up in front are much more comfortable. I might say that when we come to the question and answer period, the panel discussion, these gentlemen do not propose to use the mike and, therefore, it will be essential, at least very helpful, to have the audience down close. It will also facilitate our reporter getting the questions and answers without the use of the mike.

I am going to introduce to you these gentlemen on the platform, after which I shall turn the meeting over to the Moderator. I first want to present to you the gentleman who will deliver the first paper, Mr. L. Denman Moody, of Houston, Texas. (Applause).

The gentleman who will deliver the second paper, long a member of this Association and very active, Mr. Robert P. Hobson, of Louisville, Kentucky. (Applause).

And the gentleman who will deliver the third paper, Mr. Laurent K. Varnum, of Grand Rapids, Michigan. (Applause).

These gentlemen have prepared a very interesting program for you—very fine papers. They are very capable, competent lawyers, skilled in the practice in the Federal court. The gentleman who is going to try to keep peace among these gentlemen and facilitate the discussion is the man who will act as Moderator of this meeting, and I shall now turn the meeting over to him, Mr. Hubert S. Lipscomb, of Jackson, Mississippi. (Applause).

MODERATOR LIPSCOMB: Mr. Chairman, Ladies and Gentlemen: On behalf of the Open Forums Committee, I want to take this opportunity of expressing our appreciation of your attendance, and especially the attendance of the ladies. I don't think Mrs. Moody is here so I can

afford to tell you this: Mr. Moody confided in me that he thought the ladies were the inventors of the original mechanism of discovery and didn't need to appear.

Some of us have an intellectual interest in these rules—a scholarly interest—but all of us have a meat and bread interest in them. It is like the prisoner in jail when someone asked him how long he would be there. He said, "From now on." These rules in some form or another—there may be modifications—are with us to stay, and whether we like them or not, we might as well learn to use them.

I remember a story that I heard of a little boy named Timothy who was allergic to soap and water, and finally he became positively offensive to his teacher so she sent him home one day with a note to his mother which said, "Please require Timothy to take a bath before you send him back to school." So the mother immediately sent Tim back with a note to the teacher saying, "Tim ain't no rose. Don't smell him; learn him."

So I think the proper admonition for us to follow is not to cuss these rules, or necessarily to praise them, but to learn them. Like the saw and the hammer to the carpenter, they are the tools of our craft. We have got to work with them and we have got to live with them.

I am going to follow the admonition of one of the speakers this morning and not talk too much, so without further ado I want to present to you the first speaker on the program, Mr. L. Denman Moody, of Houston, Texas, who will discuss the subject, "The Uses to Which the Discovery Provisions of the Federal Rules of Civil Procedure May Be Put by Lawyers Representing Plaintiffs in Suits Against Insurers or Their Insureds and What Defense Lawyers Can Do to Resist or Counteract Such Uses." And if there are any plaintiffs' attorneys present, I wish the sergeant-at-arms would prevent them from making any notes. Mr. Moody. (Applause).

Thank you, Mr. Lipscomb.

We had agreed not to make use of this microphone, but either the mountain air or mountain dew has affected my voice to some little extent. I am going to have to change my speech here. I had planned to use this period to tell about the lawsuits I had won, but I see there are so many of my Texas confederates out there that I am going to have to take another tack, because I know they will rib me if I try anything like that.

I am glad to be on this program and to give you my views of these new Civil Procedure Rules on Discovery. Whenever I try to give anybody any advice I always remember the story of the great man who was on his deathbed, and looking back over his life he told his friends, "The one thing that irritates me and astounds me the most is that those few people who failed to take my advice seemed to get along just about as well without it."

So I am not going to try to give you any advice, but just give you my own personal ideas of these various rules. Like I say, they are my ideas and I am giving the speech.

All of us are bound to know just what we have come up against, more or less like the Aesop's fable, I believe it was, with three blind men who lived in this house and they were pretty well educated. They had heard about an elephant, but they didn't know anything about it, so one day word came that there was an elephant out in the court yard, so they all jumped up and went out in the court yard. The first one came to the elephant's side and he told his friends, "The elephant is like a great wall."

The next one came up against the elephant's leg, and he felt of the elephant's leg and said, "No, you are wrong; an elephant is nothing more than a big old tree trunk."

The third one, rushing out himself, got hold of the elephant's trunk and he said, "All of you are wrong." He said, "An elephant is nothing but a great snake."

So our views on these things have to have something to do with our past experience.

I understand that I don't particularly agree with the other speakers who are going to follow me on this program, and maybe some of the things I say you won't agree with.

The Uses to Which the Discovery Provisions of the Federal Rules of Civil Procedure May Be Put by Lawyers Representing Plaintiffs in Suits Against Insurers or Their Insureds and What Defense Lawyers Can Do To Resist or Counteract Such Uses

By L. Denman Moody, *Houston, Texas*

AS THE title signifies, this discussion is limited to a general survey of the uses that plaintiffs' attorneys, in damage suits, may make of the new Federal Rules of Discovery. What procedural advantages have been extended to plaintiffs by these new Rules of Discovery? What counter moves may a defendant make?

From my experience and from my study of the new discovery practice, I am firmly of the opinion that these new rules offer great advantages to the plaintiff. In the ordinary accident case, defendant's claim department is on the scene within a relatively short time, rounds up the witnesses, takes their statements, and then the entire investigation is hidden away in the remote recesses of defendant's files. This is a great disadvantage to the plaintiffs' counsel, for being usually second on the field, he obtains only the crumbs of the investigation which may have been left lying around by defendant's claim department.

I am thoroughly convinced that the new Federal Rules of Discovery, at least in so far as a damage suit is concerned, are tremendously beneficial to the plaintiff while offering only limited, corresponding advantages to the defendant. Of course, a defense lawyer's views of these Discovery Rules depends largely on the effectiveness with which they have been used against him. Faced with these new Rules of Discovery, it appeared at first that the defendant was in a very bad spot indeed. In my practice it soon became apparent to me, and is even true at this late date, that these rules are neither understood nor used by the vast majority of plaintiffs' counsel in my section of the country. I, for one, do not want any part in bettering their education along these lines. Most plaintiffs' attorneys still prefer to bring their suits in the States Courts where, of course, the rules in question do not apply. For some reason unknown to me, the average plaintiffs' counsel shies away from the Federal Court. Perhaps this antipathy for the Federal Courts has arisen from the fact that defendants' lawyers are always attempting to get in the Federal Court and this just makes plaintiffs' lawyers downright suspicious of the place.

It is not the role of this paper to discuss the various provisions of these rules, but merely to review, from a practical standpoint, the uses to which they can be put by a plaintiffs' attorney and just what a defendants' attorney can do to protect himself. If a plaintiffs' lawyer will diligently pursue the remedies open to him under these rules, he can go a long ways to take the "Adversary" out of a lawsuit which is supposed to be an adversary proceeding. A careful plaintiffs' counsel may now discover, in advance of trial, just about everything there is to know regarding his lawsuit and need not be suddenly and unexpectedly confronted, during trial, with surprise defenses and surprise witnesses. I believe that the element of uncertainty as to the facts, and the element of the unknown regarding the defendants' side of the case, is a great source of trouble to a plaintiffs' lawyer. The average plaintiffs' lawyer is constantly suspicious that some surprise tactic is about to be sprung on him. This makes him nervous and uneasy, and the more nervous he becomes the easier he is to settle with. With the weapons supplied him under the new rules, plaintiffs' counsel may now dissipate most of these fears and determine well in advance of trial just what he is in for when he gets his day in court. The investigation of a case from the defendants' standpoint is chiefly performed through the offices of claim departments or independent claim agencies, while the plaintiffs' attorney usually makes his own investigation and takes his own statements. Under the holding of the United States Supreme Court in *Hickman v. Taylor,* 329 U. S. 495, the defendants' investigation made by claim agents has no privilege and must be produced on a mere showing of good cause. On the other hand, under the

holding of that case, the work product of the plaintiffs' lawyer, who has taken his own statements and made his own investigation is entitled to a qualified privilege and must only be produced in the most exceptional of cases. It is obvious, therefore, that in many instances defendants' counsel will have to produce statements of witnesses obtained by his claim department, when in the same case the plaintiffs' counsel will not have to produce the statements taken by him because such statements are the work product of counsel and given protection under the *Hickman v. Taylor* case. Regardless of how this result may be justified in the decision mentioned, or justified in a theoretical, legal, manner, from a practical standpoint it is downright unjust and confers a tremendous advantage upon plaintiffs' counsel. The result is that the scales, already tipped in plaintiff's favor, are made to sag even more so in that direction.

The rules covering discovery procedure are Rule 16 (Pre-trial Procedure) and Rules 26 through 37 (Depositions and Discovery). I include Rule 16 for the reason that in my judgment it is a very potent weapon if properly used by plaintiff. A plaintiff will always be on the lookout to secure as many stipulations and admissions as he possibly can. Between him and an ultimate favorable judgment lie many obstacles, and the sooner he can level these obstacles, the better off he is. Not all of the Federal District Courts have adopted pre-trial procedure, but a majority of them are giving it some sort of a try. In many of the Federal District Courts, pre-trial hearings are religiously observed and thoroughly put to use. Most of you have both participated in and observed numerous pre-trial hearings. Here is the place where plaintiffs' counsel can do a great deal to level many of the obstacles which lie ahead. I have many times seen plaintiffs' and defendants' counsel come before the court for a pre-trial hearing and announce that they have been entirely unable to stipulate any facts or agree upon the production of any evidence. In a damage suit, it is practically always the defendant who does not want to stipulate and who does not want to produce. He does not, of course, want to appear overly contentious before the court, and it is astounding how a defendants' counsel will suddenly allow inspection and agree to production of statements, etc., when he is subjected to judicial interrogation and prodding by the court. It is quite easy for a defendants' lawyer to say "no" to the plaintiffs' lawyer, but this procedure is not so simple when the inquiry regarding inspection or discovery comes from the court. As a practical matter, at a pre-trial hearing, the court will usually indicate to defendants' counsel that upon proper motion he will allow the discovery of statements or the inspection of records upon proper motion by plaintiffs' counsel and that time, trouble and expense would be saved everyone if defendants' counsel would simply agree to the production or inspection. With a little coaxing and prodding by the court, capitulation usually follows. Through this method of pre-trial hearings, plaintiffs' counsel may therefore save himself a great deal of time and effort. He may secure valuable stipulations of fact and also secure agreements from defense counsel to produce various information without having to go to the trouble of preparing needless motions and briefs.

Having obtained all that he can through the means of the pre-trial hearing, and being not yet wholly satisfied, plaintiffs' attorney may proceed further under Rules 26 through 37 known generally as Depositions and Discovery. At this point in his case, the plaintiff still has at hand four important procedures for obtaining discovery. These are (1) depositions, (2) interrogatories to parties, (3) production and inspection of documents, and (4) requests for admissions. According to his case, plaintiffs' counsel can use one or all of these important procedures. In this brief discussion, I will not be able to cover all of these.

A capable plaintiffs' lawyer will always take the oral depositions of defendant's employees who are alleged to have caused the accident. Under Rules 26 through 32, the plaintiff may take the depositions of any person, whether a party to the suit or not, upon either oral or written interrogatories. If possible, plaintiffs' counsel will always take these depositions orally, for it gives him a greater scope of examination. The scope of such depositions are unlimited except that under Rule 26 (b) the questions must not relate to matters which are "privileged." The purpose of interrogation may be for the discovery of witnesses or documents, or for the purpose of obtaining direct evidence. Defendant may not object to the interrogation on the ground that the testimony would be inadmissible at the

trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

In construing the rules providing for depositions, the cases hold that the most searching of inquiry is permitted. The plaintiff may embark on almost any type of fishing expedition that he desires. He may require the witness to produce papers and documents by means of a subpoena duces tecum.

The question has arisen as to whether a party may take the deposition of an expert witness retained by his adversary in order to obtain the results of experiments and other expert matters. While there has been considerable conflict on the subject *Moran v. Pittsburg Des Moines Steel Co.,* 10 Fed. Rules Serv. 26b.411, Case 1 (U.S.D.C.W.D. Pa. 1947), the better rule seems to be that a party may, prior to trial, take the oral or written deposition of his adversary's expert witness. *Sachs v. Aluminum Company of America,* 167 F. (2d) 570 (C.C.A. 6th). Where the expert witness in question is a regular employee of defendant, there seems to be no dispute but that plaintiff may take his deposition at any time.

In the ordinary damage suit, there is not much a defendant can do to limit the scope of deposition taking by plaintiff. It was recognized in the rules, however, that the liberality accorded to a party in the taking of depositions might be abused, and accordingly provision was made (Rules 30 (b), 30 (d) and 31 (d) for the issuance of various protective orders. The issuance of protective orders under Rule 30 lies within the discretion of the trial judge. Where a defendant can make a proper showing upon motion, he may persuade the court to make one of the following rulings:

(1) That the deposition not be taken. (A substantial showing of abuse would have to be shown here).

(2) That certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters. (This type of order will seldom be made before the examination has commenced, the courts holding that these questions can be better determined on motion to terminate or limit the examination after it has commenced. Relevancy or admissibility of the evidence sought will not be passed upon in advance of the examination).

(3) That secret processes sought to be discovered may be withheld entirely or given proper protection.

(4) If the plaintiff proposes to take the deposition on oral interrogatories, the court may order that it be taken on written interrogatories. If it is to be taken on written interrogatories, the court may order it to be taken on oral examination. (Since the party taking the deposition has the right to choose his own method of examination, however, the court will usually not require a different method without some good reason).

(5) That the place of taking the deposition be changed to a more convenient location.

(6) If plaintiff insists that an oral deposition be taken in a remote place, the court may order that plaintiff pay defendant's expenses in attending.

From the foregoing, it will be noted that practically all of the rules covering the taking of depositions, both oral and written, are subject to protective orders of the court. (Rule 30b). For good cause a defendant may obtain considerable relief regarding the subject matter of the depositions, the time, the place, and the expense. Where plaintiff begins the taking of depositions, defendant should keep in mind that he can obtain protective orders from the court upon proper showing.

A further instrument of Discovery (Rule 33) consists of Interrogatories to Parties. The plaintiff in a damage suit may serve interrogatories upon defendant, and they will have to be answered under oath. The use of interrogatories is a simple way for the plaintiff to find out from defendant the names and addresses of persons who witnessed the accident in suit.

A good illustration of how interrogatories have been used in some courts is contained in the case of *Gaynor v. Atlantic Greyhound Corporation,* 11 Fed. Rules Serv. 26b.211, Case 6 (U.S.D.C. E. D. Pa 1948). Discovery here was sought by the following general interrogatory:

> "State all the facts relating to the alleged accident to the plaintiff, his injuries and his claim for damages, as to which you or your underwriters have obtained information through witnesses, agents, or other representatives."

Here defendant's entire information was contained in statements taken by its attorneys in preparation for trial. The court, nevertheless, ordered that the interrogatory

be answered, stating that this was a general interrogatory which had been worked out at a conference between the court and several of the active trial lawyers of the bar and was customary in that district.

When served with interrogatories a defendant may object to making answers. It is generally held that a party need not answer interrogatories that:

(1) Call for privileged information;

(2) Call for opinions or conclusions of law;

(3) Are so voluminous as to be oppressive, although there is a difference of opinion on this point.

We turn now to a brief discussion of Rule 34 which deals with the Discovery and Production of documents and things. Everyone here, I am certain, has read and re-read the opinion of the United States Supreme Court in the celebrated case of *Hickman v. Taylor,* 329 U. S. 495. The procedure allowed under this Rule 34 is a most important one to the plaintiff in a damage suit. I might say at this point that whether you are trying to pry information out of your adversary's file, or whether you are trying to keep your own file out of your adversary's clutches, you will find plenty of language in the *Hickman v. Taylor* case to bolster you up. Both plaintiff and defendant always claim that the *Hickman* case is "on their side."

You will recall that the scope of examination by deposition is practically unlimited and will only be restricted by the court on proper motion. But under this Rule 34, discovery and production will be allowed only upon motion and a showing of good cause.

The disturbing element here is that whether good cause is shown in the motion is addressed to the sound discretion of the trial judge. An order on the motion, one way or the other, is interlocutory only and therefore not appealable. If the object of discovery is not clearly privileged, then it is purely in the court's discretion whether or not it must be produced. This means that the decision of the court on such questions is not controlled by fixed rules of law. I believe it is unfortunate that the rule is so general and allows such discretion. The various district courts are in an unhappy state of confusion regarding what should be produced and also regarding what constitutes good cause requiring production. Some courts order production on little or no showing of good cause, while others bend over backward to deny production whenever possible. For example, I know of no case in the Southern District of Texas where the defendants' attorney has been made to produce statements taken by him, yet numerous courts in other districts have ordered production of identical statements where plaintiffs' attorney made the lame excuse that the witnesses would not talk to him. If uniformity in procedure is desirable, then it is obvious that decisions under Rule 34 have made no contribution along that line.

In many cases, the plaintiff has had remarkable success in prevailing on the court to order production. While some courts have denied production under almost exactly similar circumstances, the following extracts will show just what success plaintiffs have had with motions under Rule 34:

(1) Defendant has been made to produce photographs and diagrams of the scene of the accident, such having been made by its agents shortly after the accident.

(2) In suits against the government, it is generally conceded that disclosure of statements and other material may be had under Rule 34 and that the government is on the same basis as an individual litigant, except as to what may be termed state secrets. This is so even if the statements are taken by the F.B.I., some of whom may be attorneys. *O'Neill v. United States,* 79 Fed. Supp. 827 (U.S.D.C. E.D. Pa.). Where the disclosure would be to disclose a state secret which might seriously embarrass or harm the government in its diplomatic relations, military operations or measures for national security, the disclosure will not be necessary. If the disclosure is proper, but the government still will not make the disclosure, the court may deny the government the right to present any evidence on its defenses against negligence, etc. See also *Wunderly v. United States,* 11 Fed. Rules Serv. 26b.211, Case 7 (U.S.D.C. E.D. (Pa.), where the government in a suit under the Federal Tort Claims Act was made to disclose the contents of a written statement of an Army officer, even though such was an official Army document. No military secrets were involved.

(3) *Martin v. N. V. N.* (U.S.D.C. N.Y. 1948) 11 Fed. Rules Serv. 34.34, Case 2. Defendant's insurer had a survey made of a

hoisting block which was alleged to be defective. A copy of the report was in possession of defendant's attorney. Upon plaintiff's motion, the court ordered production of this report.

(4) Statements of witnesses obtained by defendant's claim department where it is shown that such witnesses cannot be reached by plaintiff's counsel or will not talk to plaintiff's counsel.

(5) Defendant has been made to produce, for inspection and copying, copies of statements which were actually taken by defendant's counsel in preparation for the trial. Such has been done where good cause was shown, and this lies in the discretion of the court. In one such case, defendant had given notice that he would take the oral depositions of certain witnesses. The plaintiff wanted the prior statements of these witnesses to use on cross-examination. This was granted by the court. *Kaner v. J. H. Winchester & Co., Inc.,* 10 Fed. Rules Serv. 26b.211, Case 4 (U.S.D.C.E.D. Pa. 1947).

(6) *Hayman v. Pullman Company,* 11 Fed. Rules Serv. 33.351, Case 2 (U.S.D.C. N. D. Ohio, 1948). Defendant in personal injury action was required to give names of persons who made statements to it and to furnish copies of their statements, including the statement made by the plaintiff. The fact that the statements were obtained by defendant's attorneys was held to be no objection to discovery. The defendant objected to giving the plaintiff a copy of plaintiff's own statement for the reason that defendant would thereby be deprived of the element of surprise and the use of the statement on cross-examination. The court stated that "the ultimate aim of the trial of a lawsuit is that it be a search for the truth. No possible right of the defendant may be prejudiced by disclosing all the evidence it possesses pertaining to the instant action." The court held that this procedure was proper under Rule 33 and that Rule 34 need not be resorted to. In this connection, it must be kept in mind that one of the recognized purposes of the Federal Rules is to minimize the effect of the advocate's skill on the outcome of the case. (See *Hickman v. Taylor,* supra).

Time does not permit citation of further illustrations. I might state here that the court has broad powers under the Discovery Rules to enforce its orders. (Rule 37). Witnesses who refuse to answer may be held in contempt of court. Parties who violate the court's orders relating to discovery are subject to various penalties including:

(1) Being held in contempt of court;

(2) Having their pleadings stricken from the record;

(3) Being prohibited from introducing evidence on designated issues;

(4) Having a default judgment rendered;

(5) Stay of proceedings until the order is obeyed.

I have not been able to cover the entire field, and I regret to say there are a number of other things a plaintiffs' lawyer can do to you before he turns you loose. Whenever the plaintiff embarks on any type of discovery practice, whatever it may be, get out the rules and the decisions. If you are fortunate, you will find that you are practicing law in a conservative district where the court will not allow the plaintiffs' lawyer to get elbow deep in your file.

As I stated in the beginning, I definitely feel that the Discovery Rules offer more advantages to the plaintiff than to the defendant. I have scrupulously avoided mentioning the uses to which defendant may put these rules. That side of the question will be fully covered by Mr. Hobson who follows me on this program.

MODERATOR LIPSCOMB: Since some of you have come in since the program started, I'd like to repeat the request that Mr. Stichter, the Chairman, made at the opening of the meeting, that you be kind enough to come down and fill up these seats in the front. The speakers would appreciate it, and we have a court reporter here who will want to take your questions when the question and answer period starts. So if you will please come down and fill up these front seats, it will be appreciated.

As all of you know, since the District Court dropped a bombshell in our ranks by its decision in *Hickman v. Taylor,* and since the Supreme Court dropped some manna from heaven in the same case—although it was qualified manna, you might say—there has been a welter of decisions, mostly by District Courts because there has hardly been time for many cases to reach

the appellate courts, trying to find out just what the Supreme Court meant in the *Hickman v. Taylor* decision. We are going to solve that problem this afternoon during the question and answer period. I think we will just send a transcript of the reporter's notes to all these various District Judges and that will all be settled. But that is coming at the end of the program because some of the questions that you might propound might be covered in these subsequent papers. So after the third speaker has concluded his talk, I am going to sic the audience on them, but don't address any questions to the Moderator. He is like Joe in that famous song, "He don't know nothin'."

The next speaker deals with these rules from the standpoint of the uses to which the discovery provisions may be put by attorneys representing defendants, the subject being, "The Advantages to the Defendant in the Proper Use of Discovery Procedure as Provided in the Federal Rules of Civil Procedure." I take great pleasure in presenting to you, although it is presumptuous for me to present him to this audience—it is like presenting a man to his wife—Mr. Robert P. Hobson, of Louisville, Kentucky. (Applause).

The Advantages to the Defendant in the Proper Use of Discovery Procedure as Provided in the Federal Rules of Civil Procedure

By Robert P. Hobson, *Louisville, Kentucky*

At each meeting of this Association since the adoption of the Federal Rules of Civil Procedure and especially since the proposal of amendments to these rules, there has been much discussion, particularly of the rules relating to discovery, and much criticism leveled at them and even the fear of dire consequences as a result of them.

In my judgment, the criticism of these rules and the fear of resulting damage to the defendant is very much like the expression of the drunk who found himself locked in the hotel bar, and after repeated inquiries to the telephone operator as to when the bar would open, she became annoyed and called the manager who told the persistent drunk that the bar would not open until noon and he couldn't get in until noon, to which he sadly responded "I don't want to get in, I want to get out." It would seem the great majority of defense lawyers have taken the position that they want to get out from under the discovery rules instead of using them for the purpose for which they are intended and from which great advantage will accrue.

Ever since I have practiced law we have had a Code provision in Kentucky which authorizes the taking of the deposition of the adverse party as if on cross-examination, which is substantially the procedure provided by Rule 26 of the Federal Rules of Civil Procedure. In addition to this, it has always been the rule in this jurisdiction that a party may take the deposition of any witness without being bound by it and thus ascertain what that witness knows about the facts in controversy.

Those of us who have been trying cases under the Federal Employers' Liability Act, especially those in the State courts, recognize and rebel against the plaintiff's right to take the deposition of one of our witnesses, even our own employe, and milk him dry, many times even before an answer is filed and before the defendant knows what the case is about. When such suits are brought in the Federal court and we have the right to discovery, the defendant can use exactly the same tactics against the plaintiff and secure from him all the information about his claim, the extent of his injuries and the witnesses whom he will use to support his claim. If we should test the position of the defendant in the State court with its position in the Federal court under the discovery practice, we would find that in the latter instance it is immeasurably improved.

Rule 26 provides for the taking of depositions, either a party or otherwise. Rule 33 provides for interrogatories addressed to a party only. Rule 34 provides that for good cause the court may order a party to produce for inspection or copying any document or papers not privileged which constitute or contain evidence material to the case. It will, therefore, be seen that Rules 33 and 34 provide only for interrogatories and production of papers by a party, whereas Rule 26 authorizes the taking of

the deposition of any person and he may be required to produce papers by subpoena duces tecum.

The burden of the defendant's argument is that these methods of discovery not only put plaintiff's counsel in position to secure information from defendant which he could not get otherwise, but even permits him to scrutinize the files of defendant's counsel and take from them any and all information helpful to plaintiff's cause. If we analyze the effect of this argument I think it utterly breaks down. Is there any difference between statements taken by the defendant's lawyer and securely reposing in his file from statements taken by a railroad claim agent or an insurance adjuster and reposing in the party's file. There is and should be no sanctity attached to the lawyer's file insofar as facts pertaining to the lawsuit are concerned. Such facts do not in any wise constitute a communication between the lawyer and his client within the common law or statutory privilege. It certainly would not be contended that if such facts were embodied in a police report, a telegram or the minutes of a corporate meeting that they could not be obtained. What then would be the objection to obtaining them from the files of the defendant lawyer? If we should forget for a moment the claimed disadvantages to the defendant in the discovery procedure we can and should find great advantage to him in that same procedure.

A plaintiff sued a defendant claiming that he was injured by reason of a defect in the defendant's premises. On interrogatories the plaintiff may be required to specify in what part of defendant's premises the injury occurred, who was present and the exact nature of the defect, whether it be the floor covering or the floor itself, a bannister or the treads on an escalator. *Eureka Security Fire and Marine Insurance Company v. American Stores,* 7 FRD 611.

Again, plaintiff sues to recover for personal injury, including loss of time and earnings. Defendant may compel the disclosure by plaintiff of the earnings theretofore made by him either by showing what his previous earnings were, by whom he was employed, how he earned them and even compel the production of a copy of plaintiff's income tax returns and the same would be true in connection with claimed loss of business profits. *Connecticut Importing Company v. Continental Distilling Company,* 1 FRD 190.

Where a plaintiff sues a common carrier for injury alleged to have been sustained, as to which the carrier has no notice, information or investigation, the plaintiff can be required by interrogatories, by deposition or discovery to produce all evidence which he has pertaining to the occurrence, including the names of witnesses and the doctors, hospitals and nurses who attended him. If this procedure were not available, as it was not available before the adoption of the Federal Rules of Civil Procedure, defendant would not know until it entered into the trial any of the material facts relating to the case and would not have an opportunity to prepare its defense. *United States v. General Motors Corporation,* 2 FRD 528.

Plaintiff sues the defendant to recover for personal injury and property damage. The property damage has been paid for under a collision policy and plaintiff has assigned his right to the collision carrier which does not join in the suit or seek a recovery. Plaintiff may be compelled to disclose this fact and to produce for copying a copy of the subrogation release and assignment. This would be true whether or not there is a personal injury action. *Pueblo Trading Company v. Reclamation District,* 4 Fed. Rules 470.

In the ordinary damage suit the defendant is entitled to have the following information from the plaintiff:

1. Have you ever been injured before? If so, what did the injuries consist of, where were they sustained and what physician treated you for those injuries?

2. Have you ever made a claim for damages against any person? If so, when, against whom and what was the result of this claim?

3. Have you ever been treated by a doctor or have you ever been confined in a hospital for any cause? If so, give the names and addresses of such doctors and hospitals and the reason for such treatment or confinement.

4. Do you have a written statement from any witness? If so, please file a copy of such statement. If you do not have a written statement, give the names and addresses of each witness known to you.

5. Is there any blood or marriage relation between you and any witness whom you have seen or talked to about this accident? If so, state what that relationship is?

6. When did you first secure the name of each witness referred to herein and when did you first talk to him?

It may be suggested that some of the information requested in these interrogatories would not be competent upon the trial but it cannot be fairly said that the information requested would not tend to discover competent evidence and, therefore, it would be of material help to the defendant. For instance, we have a case now where the physical examination by our doctor shows large deposits of heavy metals in plaintiff's buttocks. It is important to us to know why these heavy metals were injected and what doctor did it and for what cause. The condition which caused the injection of heavy metals may well be the cause of the disability of which plaintiff is now complaining.

We do not mean to be understood as saying that there may not be abuses of the discovery practice, but such abuses may well occur on either side and they will not occur if the opposing lawyer is vigorous in the defense of his case and the judge who determines the matter is fair. We are fortunate in Kentucky in having eminently qualified and fair Federal judges and so far as I know, there has never been a complaint either of unfairness or improper ruling in connection with discovery practice. If we were to go back to the old procedure where neither side knew or could know anything about his adversary's business, we would never know from the defendant's standpoint how to evaluate a case before trial and when we got the facts it would be too late. Isn't it better for all of us to know what confronts us and meet it fairly? From my standpoint, I much prefer to know my adversary's side of the case even though he knows mine than to go into a trial in the dark.

I sincerely believe that defendant's counsel can and will profit greatly by using the process prescribed in the discovery sections of the Federal Rules of Civil Procedure.

MODERATOR LIPSCOMB: We have had a couple of able and learned diagnoses of what is wrong with these rules, and now we are going to call in the doctor and see what the prescription is—what we can do about it. The next subject for discussion is, "Practical Remedies for Abuses, Inequities and Injustices Resulting from Present Discovery Practice in Federal Courts," and I take great pleasure in presenting to you—and I'd like to say again that being a neophyte in so far as attendance at these annual meetings is concerned, although I have been a member of the Association for a good while, it is presumptuous on my part to present any of these distinguished gentlemen to you—Mr. Laurent K. Varnum of Grand Rapids, Michigan, who will discuss that subject. Mr. Varnum. (Applause).

Practical Remedies for Abuses, Inequities and Injustices Resulting from Present Discovery Practice in Federal Courts

By Laurent K. Varnum, *Grand Rapids, Michigan*

THE title of this paper assumes that the rules of civil procedure in the Federal courts *ipso facto* result in abuses, inequities and injustices presumably to defendants and more particularly to insurance companies defending cases brought against them or their insureds. Personally, I believe in the new Rules of Civil Procedure for the Federal courts. I feel that the practice in the Federal courts has been vastly improved and simplified since the rules became effective in 1938. In my opinion most of the inequities and injustices that have occurred have resulted not primarily from the provisions of the rules themselves, but from the failure of counsel for one or the other of the litigating parties to make full use of the rules for the advantage of their respective clients.

For years laymen have criticized the law as being cumbersome and lawyers overtechnical. It has been said frequently and not without reason that the trial of a lawsuit is more a test of wits and showmanship than an inquiry into the truth for the purpose of accomplishing justice between the parties. Businessmen have turned to arbitration, and administrative tribunals have progressively encroached upon the business of the courts because of the feeling that the rights of individuals should be decided by more simple methods than the technical

rules of court procedure. If the courts are to meet the needs of modern business and society, the rules of the game must give way to the rights and justice of the parties.

I feel, therefore, that in any approach to a discussion of court procedure, we should first recognize the interests of the litigants and disabuse our minds of the inherent prejudice that lawyers as a group seem to have for any change. The old common law pleader had to decide at the risk of his client losing his rights whether the form of action should be, for instance, trover, replevin or detinue, and yet I have no doubt that he resisted the simplification of the rules of pleading and felt that the new-fangled practice under the Codes resulted in abuses, inequities and injustices. Even today in some jurisdictions the meaningless jargon of the common counts in assumpsit and a plea of the general issue are sufficient to bring litigants into court to try anything from a suit on a note or insurance contract to a labor claim, but to the ordinary layman it certainly seems more sensible for the pleadings to set forth the specific facts claimed by both parties than to frame issues on pleadings couched in technical legal claptrap.

The Rules of Civil Procedure for the Federal courts, and particularly Rules 26-37, concerning discovery, are to my mind one more step forward in the modernization of our court procedure and its adjustment to the needs of modern society. I am sure that in the field of pleadings none of you would want to return to the dark ages of Chitty and Blackstone, and I am equally sure that many practitioners who now decry the advancement made possible by the Federal rules of discovery would, if they made freer use of them, be equally reluctant to return to the former practice.

Prior to the new rules, the only processes open to the parties by which the facts of a case could be discovered were the limited statutory rules regarding depositions *de bene esse* and the cumbersome bill for discovery under old Equity Rule 58. Of these procedures Judge Woolsey once said:

> "That at this date the practice on the law side of the Federal courts should be so lacking in plasticity with regard to interlocutory remedies seems extraordinary when it is remembered that under the procedure in almost all states through examination before trial or otherwise, the plaintiff can secure evidence and documents in advance which he can use at the trial, and also that throughout the British Empire, including all its Dominions, India and the Crown Colonies, any paper or letter even remotely connected with the case must, unless privileged, be discovered to the opposite party and remain available to him *pendente lite* that he may, if he wishes, offer it at the trial. It is unfortunate that the practice of automatic compulsive discovery is not in force here. (*Zolla v. Grand Rapids Store Equipment Corporation,* 46 Fed. (2d) 319).

This was the situation under the former practice. In order to disabuse our minds of the inherent prejudice which results from the conservatism of the legal profession, let us examine briefly some of the advantages that flow from a liberal discovery procedure such as that found in Rules 26 to 37 of the Federal Court Rules, bearing in mind that the ultimate object of any litigation should be to ascertain the truth and accomplish justice between the parties. In the first place, and especially where court dockets are crowded and long delays ensue between the time when a case is at issue and it is finally brought on for trial, the witness is examined while his memory is fresh and generally without detailed coaching, with the result that his testimony is likely to be more unbiased and spontaneous. Such a witness cannot readily change his testimony if it has been preserved by deposition, nor can a party readily manufacture testimony in contradiction of such a deposition. Thus, the discovery procedure is an effective means of detecting and exposing false, fraudulent and manufactured claims.

In the second place, the testimony of the witnesses may be preserved so that if the witness dies or moves away or for any other reason become unavailable at the trial, his deposition can be used. Thus, the discovery procedure makes available in a simple, convenient and inexpensive way facts which sometimes could not have been proved at all or without great difficulty.

In the third place, both parties and their attorneys can, by full use of the discovery procedure, advise themselves of all the relevant facts and thus more readily evaluate their respective claims and defenses. With this information at hand, attorneys can more intelligently advise their clients with respect to the probable outcome of the

pending litigation and thus encourage settlements, or at least expedite the trial of the case by narrowing and simplifying the factual issues to be disposed of.

By and large, it seems to me that the advantages of the Federal discovery procedure far outweigh its alleged abuses, inequities and injustices. The practical approach, therefore, seems to me to be to make the best use of these advantages rather than to avoid them through inherent prejudice or because of the feeling that they were framed to benefit the plaintiff and to injure the defendant.

The best use of the Federal Rules of Civil Procedure involves not only those rules pertaining directly to discovery practice, but also all other provisions of the Rules designed to modernize and simplify procedure in the Federal courts. The rules pertaining to pleadings were designed primarily in the interests of simplification, but it seems to me that frequently this simplification is carried too far. For that reason, I would recommend as one of the practical remedies a careful study and a liberal use in appropriate cases of Rule 12 (e) which permits a defendant to move for a more definite statement of plaintiff's claims before interposing his responsive pleading. I realize that this section of the Rules has not been in good repute with many courts, particularly prior to its amendment in 1946. But I firmly believe in a full statement of at least the basic facts upon which any claim or defense is founded, and also that although simplification of pleadings is desirable in many cases, the so-called skeleton form of complaint is so vague and ambiguous that the defendant has a right to be advised more particularly with respect to the facts upon which the plaintiff relies.

In this connection, it should be borne in mind that under Rule 26 (a) as amended in 1946, the deposition of anyone, whether a party or not, cannot be taken by the plaintiff as a matter of right until twenty days after commencement of the action, although the defendant may take depositions for purposes of discovery at any time without leave of court. This not only prevents unnecessary annoyance and harassment of the defendant regarding matters which he intends to admit, but also gives the defendant a distinct advantage in the matter of time. Some defense attorneys make it a regular practice to take the deposition of the plaintiff and even some of his witnesses immediately after the complaint is filed and before the answer is prepared. The advantages to the defendant in such practice are obvious.

I would also recommend as a practical remedy the liberal use of pre-trial procedure under Rule 16 as a means of narrowing the issues after full discovery of the facts. In the use of Rules 26-37 regarding discovery, the practitioner should have in mind the later use of pre-trial procedure as a means of eliminating pseudo issues and bringing out the real points in controversy. The whole point is that if the pleadings have been made sufficiently complete in the first place to advise the parties of the issues involved, and if both parties through a liberal use of the discovery practice are thoroughly acquainted with all of the factual aspects of the case, they are then in a position to cooperate with the court at the pre-trial conference in a conscientious effort to simplify, shorten and possibly even avoid a trial of the case.

I have heard it said that the discovery procedure, and especially Rule 26 in regard to depositions, is inequitable and unjust to the defendant, since it enables the plaintiff to obtain all of the defendant's knowledge regarding the case, and thus gives him an opportunity to manufacture testimony to meet the facts thus discovered. The fallacy in this argument is that it overlooks the fact that the rules give the same rights of discovery to the defendant as they do to the plaintiff, and where these rights are equal and co-extensive, the defendant, by proper use of the discovery procedure, can protect himself against this so-called abuse. In other words, there is no point in the plaintiff taking the depositions of the defendant and his witnesses merely for the purpose of enabling him to manufacture testimony to meet the facts thus discovered, since the defendant can also and immediately take the testimony of the plaintiff's witnesses and of the plaintiff himself.

All of us who are engaged in the trial of cases come to think of certain witnesses as "ours" and of all others as adverse. There is probably not a man here who has not bristled up his hackles and sidled in like a fighting cock on seeing his opponent conversing with one of *his* witnesses. True, you have talked to this witness and probably have subpoenaed him, and at least you *think* you know what he is going to

say. But do you want him to speak any more or less than the truth? Your opponent will hear his testimony eventually anyway, so why should either side be entitled to conceal the truth from the other? It seems to me that we should try to revise our approach to such matters and to adopt the view expressed by William Howard Taft that "witnesses do not belong to one party any more than to another."

In using Rule 26, it should be borne in mind that a witness may be examined on any matter not privileged which is relevant.

In *Rowe v. Union Central Life Insurance Company,* (1 Fed. Rules Service 26 b.41), The District Court of the District of Columbia held that the defendant's attorney may refuse to answer questions as to the identity and location of witnesses where the only information he has in that regard was obtained from the defendant and hence privileged. More recently, in *Jenkins v. Pennsylvania Railroad Company,* decided by the District Court for the Eastern District of New York on May 9, 1949, it was held that an injured railroad employee could not require the local attorney for the Railroad Company to produce the out-of-state carrier's file. A witness whose deposition is being taken may refuse to answer if he considers the matter privileged or not relevant, and since the officer before whom the deposition is being taken cannot punish for contempt, the only remedy the proponent has is to apply to the court under Rule 37 (a) for an order compelling the witness to answer. Also, under Rule 32 (c), objections to testimony are not waived unless the ground therefor might have been obviated or removed at the time of the taking of the deposition.

It is probably true, as stated by Mr. Moody, that the language of *Hickman v. Taylor,* (329 U. S. 495) provides a source of aid and comfort for almost any proposition which the ingenuity of counsel can advance for or against the Federal discovery procedure. But it seems to me that the heart of that case is that regardless of privilege or relevancy, the person seeking discovery must assert some justification for the use of the rules in that regard, and conversely, that discovery cannot be resorted to simply for the purpose of annoying or harassing an opponent. If an attempt is made to abuse the discovery procedure in this regard, ample protection is afforded by Rule 30 (b) which allows any party or the person to be examined to apply to the court for an order that the deposition shall not be taken, or that the scope or manner of taking shall be limited, or the court may make any other order which justice requires to protect the party from annoyance, embarrassment or oppression. By Section (d) of Rule 30, the same remedies are afforded to any party or the witness at any time during the taking of the deposition. The rule, in the light of the Supreme Court opinion in *Hickman v. Taylor* affords any party or any witness ample protection from the abuse of the discovery examination, and if resorted to, should prevent any injustices or inequities which might result from the broad language of Rule 26.

In addition to discovery by deposition, there are, as you know, four other processes for discovery contained in the Federal Court Rules, namely, interrogatories, production and inspection of documents, physical and mental examinations, and requests for admissions. Written interrogatories are much more limited, and hence less efficacious than oral depositions. In the first place, they may be used only against adverse parties and are not applicable to witnesses generally. In the second place, the interrogated party is fully advised as to all of the questions before he is required to answer any of them, and he has ample time to formulate his answers in writing after advice of counsel in order that they may best accord with his theories of the case.

Nevertheless, written interrogatories do serve an important function. They are a simple method of obtaining the names and addresses of witnesses or securing information with respect to documentary evidence. Although they may not be used as evidence in the case as a deposition may under certain circumstances, still they may be used for purposes of impeachment if at the time of the trial the party interrogated attempts to change his testimony. Here again, as in the case of the application of Rule 30 to depositions, the scope of interrogatories may be limited by objections properly presented to the court.

Discovery of documents is covered by Rule 34. Although this rule applies only to parties and not to witnesses, it should be considered in connection with Rule 45 providing for subpoena *duces tecum.* Thus, the two rules considered together enable a

party to obtain access to books, papers or documents, whether in the hands of the party to the litigation or a witness. The scope of discovery and production of documents is safeguarded by the provision that it may be had only upon order of the court after motion of a party showing good cause therefor. Annoyance and harassment may be avoided by insisting upon the requirement of good cause. In a recent case, decided May 18, 1948 (*Martin v. Capitol Transit Company,* 11 Fed. Rules Service 34.411), the Circuit Court of Appeals for the District of Columbia refused to require the production of the written report of the driver of the defendant's vehicle. The court said:

> "Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party '*showing* good cause,' not upon a mere allegation or recitation that good cause exists. The rule contemplates an exercise of judgment by the court, not a mere automatic granting of a motion. The court's judgment is to be moved by a demonstration by the moving party of its need, for the purposes of the trial, of the document or paper sought."

In an even more recent case (*Safeway Stores, Inc. v. Reynolds,* 18 LW 2008), plaintiff's counsel sought discovery of a statement which plaintiff in a personal injury action had given to defendant's insurer, the motion being based upon the allegation that the statement was needed to determine whether it contained matter inconsistent with the plaintiff's present position, or as plaintiff's counsel said: "To know what our man said shortly after the accident." The District Court held that such reasons did not satisfy the requirement of good cause, and denied the motion to produce.

I am convinced that, particularly with respect to this Rule 34, the abuses or inequities that may have resulted will largely disappear when the courts have clarified the application of the rule and counsel for the litigating parties become more familiar with the protection afforded by such limitations.

Rule 35 is to my mind of much greater assistance to the defendant than to the plaintiff in any ordinary case involving an automobile accident or suit on an accident insurance policy. As you know, it enables the defendant in such cases to obtain a physical or mental examination of the plaintiff and provides that if the plaintiff requests a copy of the report of the examining physician, the defendant thereupon becomes entitled to receive from the plaintiff any similar reports of physical or mental examinations previously or thereafter made. By requesting a copy of the report the plaintiff also waives any privilege he may have regarding the testimony of every other person who has examined or may thereafter examine him with respect to the same mental or physical condition. The full use of this rule by defendants in insurance cases should do much to eliminate pseudo claims by fraudulent claimants or malingerers.

The extent to which Rule 36, regarding admissions, may be used in narrowing the issues or even in obtaining summary judgments has, I believe, been overlooked, particularly by defense attorneys. I would recommend to each of you a rather careful reading of *Walsh v. Connecticut Mutual Life Insurance Company,* (26 Fed. Supplement 566) which was an action for double indemnity benefits under a life insurance policy. In that case, the defendant's attorneys framed extensive requests for admissions under Rule 36, the effect of which was, if answered truthfully, apparently to entitle the defendant to a summary judgment. The plaintiff sought to avoid this result by refusing to answer because of privilege and other more frivolous grounds, but the court held that it would not place such a useless and futile construction on the rules, and required the plaintiff to answer or submit to a summary judgment in favor of the defendant.

This case illustrates in a very concrete way what I deem to be the most practical remedy for the so-called abuses, inequities and injustices resulting from the present discovery practice in the Federal courts. I firmly believe that if we can disabuse our minds of the prejudice which has arisen from the apparent belief that the discovery practice primarily benefits plaintiffs and if we can ourselves make full use of the opportunities afforded to ascertain the truth, we will all become enthusiastic proponents of the Federal discovery procedure.

MODERATOR LIPSCOMB: I am sure that all of you share the appreciation of the members of the Forum Committee and my own genuine appreciation of these

three splendid and enlightening papers.

Now we come to a very interesting part of the program which will last just as long as yon gentlemen make it last and just as long as there are practical, interesting questions to be fired at these three speakers. I am sure that all of you, as I have, have problems pending in your offices that you would like to have some light shed on, but, if I may, I would like to lay down a few ground rules for the general discussion.

One is that when you rise to ask a question that, for the benefit of the reporter and the record, you please state your name, and state your question distinctly, in order that it may be heard by the speaker, the audience, and the reporter.

The second is that you stick to the subject of the discussion, and that is discovery practice in the Federal Court. I know all of us might be tempted to get off into some allied field, but the time does not permit that, so we will request that your question please relate to the subjects that have been discussed.

I now throw the meeting open for questions that any of you care to propound to any of the three speakers. I suggest that you propound them through the Chairman and he will undertake to name the goat.

MR. TAYLOR H. COX (Knoxville, Tenn.): I hesitate to open this discussion. The plaintiffs' attorneys in Knoxville probably fall in the category that Mr. Moody described. They are probably lazy and, as a result of that, my practice in connection with this particular question has been somewhat limited, but under this discovery practice is the plaintiff's counsel entitled to secure from the defendant or his counsel their opinion as to the liability under the facts in the action?

MODERATOR LIPSCOMB: The question, as I understand it, is whether or not the plaintiff's counsel is entitled under the rules, or any of them, to secure from defendant's counsel, defendant's counsel's opinion as to liability in the case, and I believe that that comes within the domain covered by Mr. Moody. I will ask Mr. Moody to please answer that question.

MR. MOODY: I am glad that that one was asked me because that will probably be the only one that I can answer. Of course, the answer is definitely not. It is not a fact, but an opinion, and it is about the only thing that is protected under the *Hickman* case as a work product of counsel, and I hope all our opinions are work products or we might as well all quit.

MR. GOBLE DEAN (Miami, Fla.): Very often when the plaintiff's attorney takes depositions in Miami, if he knows there is a low limitation on the policy, he is tempted to go into an examination of the defendant to find out what their financial resources might be. Ordinarily we would do that by a supplementary proceeding. I was wondering what the opinion might be as to such proceedings or questions as that.

MODERATOR LIPSCOMB: The gist of the question is, as I understand it, whether or not these rules can be made the instrument of requiring the defendant to disclose his pecuniary condition; is that correct?

MR. DEAN: That is right.

MODERATOR LIPSCOMB: I believe that will come within the province of Mr. Hobson's paper. Mr. Hobson, will you answer that, please, sir?

MR. HOBSON: I have no adjudicated case on the subject, but answering it on the basis of the rules as they now exist, I would say certainly he is not entitled to that information. In the first place, it certainly isn't competent to the question, or any question, in the case. In the second place, even though it be not competent, if it helps to develop facts that are competent, then within the scope of the rule it could be discovered, but it is not relevant to any fact in issue in that case. Now, if there be jurisdictions where the insurance company is permitted to be made a party to the litigation and the amount of its policy liability is in issue, then, of course, under such statutory provisions I think that would be a proper question for discovery.

MR. FORREST A. BETTS (Los Angeles, Cal.): I should like to ask this question, and I assume it comes properly under the category of the next speaker so this is a good time to ask it.

My recollection is that the address, shall I say, of this Committee against the rules of discovery and the like address of the same Committee for the Insurance Section of the American Bar Association, of which I am presently chairman, against the rules of discovery, have not been necessarily against the rules of discovery as such but

against the extremely liberal wording of the two sections, and I may have their numbers wrong, Mr. Varnum, but the two sections concerning depositions and documentary evidence, and particularly documentary evidence.

Now, is it your belief that we are going to profit, in the interests of justice, by being compelled at the discretion, with all of the liberality which that gives, of the District Court to say that our entire file shall be open to the hand wandering of the mind of unscrupulous plaintiffs' lawyers? Do I make myself clear?

MODERATOR LIPSCOMB: I believe that all of you heard that question very distinctly, so I am not going to take the time to summarize it, but will ask Mr. Varnum to respond to it.

MR. VARNUM: Well, of course, the question assumes something which is not in evidence. The question assumes, of course, that plaintiff's counsel can, as Mr. Moody stated it a little more picturesquely, put his hand in up to the elbow in yours and the company's file. I do not believe that that is one hundred per cent true.

I might say at the outset that I do feel that the proper application of the Federal Rules for discovery, as I said, will be in the interests of justice, and that when its limitations are more clearly defined we will find that we are more enthusiastic about it than we are now.

Now, under *Hickman v. Taylor,* as I read it, there are, it seems to me, two principal features with respect to your question, Mr. Betts. The first is that the requirement of good cause must be shown. In other words, the plaintiff's counsel must establish to the satisfaction of the court the need for the particular documents or the particular information which he desires either under Rule 34 with respect to documents or Rule 26 with respect to depositions.

If, during the course of the taking of the depositions, it is the opinion of the witness or the party or his counsel that plaintiff's inquiries are going too far, he may stop the deposition at that moment and make application to the court for a limitation of the scope of the examination. If the interrogatories go too far, the same result may be accomplished. If the request for documents goes too far, I assume the court will take care of that at the outset because, of course, the order of the court covers the particular documents required.

Now, the second point of *Hickman v. Taylor,* as I see it, is that the documents to be discovered are only those which are relevant to the cause and which are needed by plaintiff's counsel to ascertain the facts of the case —or defendant's counsel. We keep talking about plaintiff's counsel because we keep thinking that these rules work only one way. They don't. They work both ways, and if defendant's counsel want to obtain the inspection of documents from the plaintiff's file, he has equal and coextensive right with the plaintiff.

I think that under the *Hickman v. Taylor* case many documents in an attorney's file cannot be discovered to opposing counsel. That case, as you know, was a case in which the Circuit Court of Appeals overruled the District Court in requiring the discovery of documents, and the Supreme Court of the United States affirmed the Circuit Court of Appeals in that regard. So when we speak of *Hickman v. Taylor,* we are speaking of a case which placed definite limitations upon the operation of discovery procedure, and particularly Rule 34.

So I think, generally speaking, that when these limitations are more clearly set forth by the court, and when they are more familiar to counsel, the net result on both sides will be a nearer approximation to justice.

MR. BETTS: May I supplement that, Mr. Moderator, and then I will try to keep out of this?

MODERATOR LIPSCOMB: Yes, sir.

MR. BETTS: May I ask Mr. Moody now if he agrees with Mr. Varnum's interpretation of the limitations of *Hickman v. Taylor* over which we have had so much problem, and if not, what does he consider to be the limitation, if any, upon the discretion of the District Court?

MODERATOR LIPSCOMB: Mr. Moody.

MR. MOODY: Well, I personally don't think that there is the slightest limitation on the discretion of the court. In fact, that case says that that is a limitation; that in itself is the court's limitation.

Now, I am always suspicious of anybody's motives when they start saying, "Let's throw open the files and bring out the truth." I was sitting down in Houston not long ago and a Federal judge from

Oklahoma came up there and he went on in this vein and here is the way he looked at the new rules. Now, he had been a Federal judge for many years. He said he was tickled pink with the new rules. I was rather surprised the man talked this way. He said the reason he gets lawyers over in his office on pre-trial hearings is he has them sit around his waiting room for anywhere from three to six hours, and he said, "You know, they get tired sitting there and they begin to talk settlement," and he said, "They come in there and the plaintiff will say, 'I want to discover this.' I say, 'Sure; discovery.' About that time the defendant begins to settle." And he said, "I have been on the bench for over six years, and I have never read a pleading to this good day. I love the rules because I get to spend more time at home with my children."

MR. R. B. MONTGOMERY (New Orleans, La.): That brings me to a question I want to ask. What remedy do you have by appeal or otherwise where you believe the discretion of the court is being abused? I think that is going to become a very important factor in these rules. Are we going to be completely at the mercy of the District Judge, or are we going to have a remedy? As you know, in the District of Columbia you can take an appeal from an interlocutory order provided you are going to suffer irreparable injury. There are many instances in these rules where there is an abuse of discretion by the District Judge, and what are your rights? Do you have to wait until the end of the trial or not?

MODERATOR LIPSCOMB: That is a good question. The question is, under 30 (d) where a party applies to the court for protection and the court denies it, can you stop the deposition and take an interlocutory appeal, or do you have to try the case to the conclusion and then appeal on the whole case when maybe the damage is already done? Is that the question, Mr. Montgomery?

MR. MONTGOMERY: Yes.

MR. VARNUM: I can answer that, I think, by an illustration; I mean by merely quoting the *Hickman* case because the appeal went up in the *Hickman* case in an interlocutory manner, I should say.

Now, in that case the plaintiff filed written interrogatories in which he demanded that the defendant's attorney, who had investigated this case and had interviewed the crew of this vessel and had taken their statements and so forth, give the names of all those witnesses and produce all of these statements and reports and so forth and so on. Mr. Fortenbaugh objected to answering that interrogatory and it went before the District Court under the procedure prescribed in the rule. The District Judge in his discretion, Mr. Moody, held that those matters were discoverable and ordered Mr. Fortenbaugh to produce those documents. Mr. Fortenbaugh, nevertheless, refused to abide by the order of the District Judge, and the District Judge held him in contempt. Mr. Fortenbaugh then appealed to the Circuit Court of Appeals from the contempt order, and the Circuit Court of Appeals reversed the District Judge, and the Supreme Court affirmed the Circuit Court of Appeals, and I don't see how Mr. Moody says that the Supreme Court decision is to the effect that the discretion is entirely in the District Court.

MR. MONTGOMERY: Suppose you don't like the parish prison in New Orleans and don't want to run that risk?

MR. MOODY: May I answer the question?

MODERATOR LIPSCOMB: Yes, sir.

MR. MOODY: Mr. Montgomery, I'd like to give you a little different answer that I think is specific and I hope will be satisfactory to you. There isn't any question about the fact that while the defendant or the plaintiff, whoever it may be, may not appeal from the order, he has a specific remedy, upon the showing of irreparable injury, to ask for and obtain from the Court of Appeals a mandamus or writ of prohibition.

Now, that procedure is specifically outlined in the case of *ex parte Peru*, 318 U.S. 578. The question raised there was whether the writ could be applied for directly to the Supreme Court in lieu of the application to the Court of Appeals, and the court held that under the peculiar facts of that case the writ would be issued by the Supreme Court because it was a matter of conflict between the several departments of the Government, but in the ordinary case they point out that proper procedure under the specific Federal statute is by a writ of mandamus or prohibition to the

Court of Appeals for the particular circuit within which the District is located.

MR. H. L. SMITH (Tulsa, Okla.): Mr. Varnum emphasizes the value of pre-trial procedure, and Mr. Moody pointed out that that is not always altogether satisfactory. I wanted to make an inquiry as to the practical use of interrogatories as contrasted with depositions. Mr. Varnum emphasized the point that the deposition route is much more satisfactory.

Here is my question: Is there any limitation of the scope of depositions after written interrogatories have been prepared and answered?

MODERATOR LIPSCOMB: The question is as to whether or not there is any limitation as to the scope of depositions after written interrogatories have been propounded to the adverse party and answered? Mr. Moody, will you answer that, please, sir?

MR. MOODY: Well, I don't know whether you mean interrogatories to a party or to a witness.

MR. SMITH: The interrogatories can only be prepared and propounded against a litigant.

MR. MOODY: Well, I think this: You can take the same party's deposition as many times as you want, whether it is oral or written, and until the other side can come in and by motion show that you are abusing the right and you are just making the other party run up and down the country I think you can take at least twice on either one, vice versa. In other words, if you get interrogatories answered, you can come along later and take an oral deposition.

MR. SMITH: Cover the same ground and then go further?

MR. MOODY: I certainly think so.

MODERATOR LIPSCOMB: You go ahead, Mr. Moody, with the statement you started to make.

MR. MOODY: The only thing I was going to say—it may be a little late now—is that there is not any decision in the books that you can appeal from any such order on these discovery practices, and I don't think you are going to be able to. By the time you get up to the Circuit Court with your writ and get back, you will find the plaintiff has got a judgment against you, and not only that, but if we have got to be going to jail to protect our clients, I think we had better start finding something else to do.

MR. HARRY T. GRAY (Jacksonville, Fla.): Along the line of this gentleman's question, having used the rules and having taken deposition and having had documents produced, can you then ask for admissions based on the facts discovered in the deposition and by the documents?

MODERATOR LIPSCOMB: Mr. Hobson, I believe that is your baby. The question is, having used the rules for taking depositions, whether you can then move for the production of documents touching on the same question. Is that it?

MR. GRAY: No. Then ask for admissions under the other rules based on the facts you have discovered out of the deposition or the documents.

MODERATOR LIPSCOMB: Could you then request admissions?

MR. HOBSON: As I understand, there is absolutely no limitation on it. You can take your deposition or get the information by interrogatories and then upon the facts that you have then discovered ask for admission of other facts, or ask for admission of facts which are shown to be true by the answers given to the interrogatories or in the deposition. To me, at least, that is not close.

MR. LOWELL WHITE (Denver, Colo.): Mr. Chairman, I would like to ask Bob Hobson a question. In many cases of trial involving an oral agreement or a negligence case the whole heart of the case is credibility. There is nothing but a question for the jury to decide who they are going to believe. Supposing that you have some facts in your file that it would be important to bring out as surprise. How can you protect those facts from being given to the opposite party, a good practical way of protecting yourself against giving away that information? You may honestly believe that the other party is not entitled to judgment, or at least not entitled to a large judgment, but if those facts are given away you lose wholly their effect. Is there any way to protect yourself?

MR. JOHN B. MARTIN (Philadelphia, Pa.): I am practicing in the Eastern District of Pennsylvania. On behalf of the lawyers in Philadelphia who are members

of this Association and any of their clients that might be present, we had nothing to do with the making up of that interrogatory to which Mr. Moody referred. We have admiralty lawyers and some other fellows in the Eastern District and the District Court seems to be their playground, and they did get together and did make up with the plaintiffs' attorneys and the judge the canned interrogatory Mr. Moody referred to.

Now, in answer to your question, isn't there a distinct advantage to the attorney for the defendant in that before there can be any discovery and at the time he files his answer he can then ask to examine the plaintiff orally, and can he not set up the background to meet Mr. White's problem after the plaintiff's testimony is taken by oral examination before there is any other discovery?

MODERATOR LIPSCOMB: Mr. White, does that answer your question?

MR. LOWELL WHITE: It does not.

MODERATOR LIPSCOMB: You asked one of these gentlemen to answer it. I believe it was Mr. Hobson. I am glad to hear from the gentleman from Pennsylvania because after listening to these papers I had about reached the conclusion that all of our ills could be cured by simply abolishing the Eastern District of Pennsylvania. (Laughter). Mr. Hobson, will you supplement what the gentleman has to say?

MR. HOBSON: Lowell, in order to answer your question and not do any more dodging than I have to, I'd like for you to make it more specific, because on the general question that you ask it is impossible for me to answer it.

MR. LOWELL WHITE: Well, a case where there are two persons and they are the only ones who know about it, and you have some facts—

MR. HOBSON: What is the nature of those facts?

MR. LOWELL WHITE: Some physical facts as to how the accident happened, admissions he may have made to someone else that will be contradictory to what you know that he will say or what he may have given the gentleman from Eastern Pennsylvania on deposition, something that you know is contrary to what he has already said that you are going to be prepared to spring to show he is not telling the truth. How can you protect yourself?

MR. HOBSON: My answer to that is you can't protect yourself. If I may illustrate it this way: You have a deposition which that plaintiff has given not in this case but in another case, and your adversary doesn't have it and doesn't know anything about it, or you have a statement from John Jones or Dr. Smith or someone else which crucifies the plaintiff in his contention. Now, there isn't any way, in my judgment, by which you can protect yourself against the disclosure of that statement.

Now just one moment, please, sir. I would like to address myself to Mr. Martin for just a moment, and I think this would be of interest to most of you. I think his suggestion is a most timely one and I'd like to call attention to this fact: Under the rules the plaintiff cannot, without leave of court, take any deposition before the time for answer has expired. On the other hand, the defendant has an absolute right to take the plaintiff's deposition, or any other deposition that he wants to take, the day the suit is filed, or the next day. He doesn't have to wait the twenty days. So if we don't get the information that the plaintiff has, it is our fault. We have the advantage, especially in that situation. Does that answer your question, Mr. Martin?

MR. MARTIN: Yes.

MR. SAMUEL LEVIN (Chicago, Ill.): Representing the defendants I have had no trouble procuring an order from the court to take plaintiffs' depositions and have the answers filed, say, twenty days after the completion of the depositions, but with reference to Rule 26, if I may address this to Mr. Varnum, about limiting the scope of the examinations, I have taken full advantage in the taking of plaintiffs' depositions of the last new sentence of Paragraph 26.

Mr. Varnum states, if I get it correctly, that limits improper questions. Now, the limitation, as I recall the rules, is when written interrogatories are submitted, then when those written interrogatories are submitted you have the opportunity to go into court and limit, or attempt to limit, the scope of those questions that are asked, but in view of the last paragraph of Section 26, which applies to oral interrogatories, oral

examination, as I recall that last sentence, which is new, the questions are not limited to those questions which may be relevant or material upon the trial of the case. Just for clarity, how would you limit that situation?

MR. VARNUM: You are speaking of limitations on depositions taken under Rule 26?

MR. LEVIN: Yes, especially the new last sentence.

MR. VARNUM: That is covered by Rule 30 (b), and Rule 30 (b) provides that prior to the time of taking the deposition the party to be examined, or his counsel, or the adverse party, may apply to the court for limitations upon the scope or manner of taking the deposition, or 30 (c), I think it is, provides that if during the taking of the deposition the party being examined or if the adverse party to the case feels that the scope of the examination is going too far, the deposition can be stopped at that moment and application can be made to the court to limit the scope of the examination.

MR. LEVIN: I got one answer by the court on that just last week in which he said, "Well, counsel for the plaintiff thinks this will lead to some evidence and, therefore, you had better answer those questions and make your objections."

MR. BETTS: May I bother again? I failed to leap one of the hurdles and only one, and may I say again it is my impression from the years that we have been discussing discovery here and in the American Bar Association under the able leadership of John Martin and of Wilbur Benoy before us, I agree with Mr. Varnum and Mr. Hobson, and I am sure that Mr. Moody does, that these Federal rules are extremely advantageous and that they are to be desired in the whole, but I am unalterably opposed to the proposition that anybody has a right to come into my file and reap the profits of my investigation, nor do I take the position that I am entitled to reap unearned on my part the profits or benefits of the investigation or the case of the plaintiff.

Now, the thing that bothers me is this: Let's accept the proposition that it is a good thing, but shouldn't we have some definite rule that limits what the District Court can say must come out of our file, or are we going to permit this legal problem to shoot up into the stratosphere and circle around up there without any limitation whatsoever? That is the thing that I object to, and I would like to know what is the answer to that? What is the cause? What is the limitation of cause? That is the one thing that bothers in the application of this rule, just as Mr. Levin has said. Is there ever going to be any answers to that other than a multitudinous number of decisions by various District Judges?

MODERATOR LIPSCOMB: The question, as I understand it, is whether or not the extent to which you can dip into your adversary's file for information should be by rule binding on all courts or left to the discretion of the individual judge; is that right?

MR. BETTS: With some definite definition of what can be secured.

MODERATOR LIPSCOMB: Provided by rule.

MR. BETTS: Yes.

MODERATOR LIPSCOMB: Mr. Moody, will you respond to that?

MR. MOODY: I knew they would hit me on up. I don't think it ought to be discretionary, of course I don't, because a lot of this discretion depends on what side of the bed they got up on. I think that we ought to have some rule of law to cover it, and as to what it is, I haven't studied it enough or had sufficient experience to try to prescribe one, but I do think that this Association, being this much worried about it, ought to get up a committee or something and try to make a study of it and make some recommendation because it seems the trend of everything in this country is to go further and further. There are a few Republican judges left, and they are still hanging like grim death on to what they think is right and wrong. A lot of these other ones are going all the other way. There we are.

MR. HARRY F. STILES (New Orleans, La.): I am a freshman here so perhaps I shouldn't be on my feet, but I would like to ask a question that may, in turn, answer the last question. The *Hickman v. Taylor* case, of course, is largely open, as we all know; at least, the large majority of the

opinion is nothing but an expression of the Supreme Court as to what they think the rule should be and really had nothing to do with the final decision, but it seems to me that the case clearly implied as to the production of statements that the discretion was limited to the statements of those witnesses who were not available to the adversary, and if that is applied by the courts, then I think the discretion is properly limited because there are very few witnesses who are not available to both sides on a true construction of the word "availability," and if the *Hickman vs. Taylor* case is interpreted in that light, then the discretion is very definitely limited, and I would like to have that confirmed by the speakers here.

MODERATOR LIPSCOMB: Mr. Varnum.

MR. VARNUM: That is my understanding of it, Mr. Stiles. Not only that, but the court even went further to say that these reports and opinions and other matters in the attorney's file were what they call the work product of the lawyer and were privileged. Now, in my judgment, at least, that part of the opinion is not obiter dictum, but is a decision of the case, because that was the decision of the Circuit Court of Appeals that the matter requested was privileged, and that is why the Circuit Court of Appeals reversed the District Court, and the Supreme Court affirmed the Circuit Court of Appeals.

Now, it is true, as you say, that the court went further than that and discussed good cause to some length in the opinion and held as dictum, if not decisions, that if witnesses were available to the party seeking discovery, that good cause had not been shown for the production of their statements.

MODERATOR LIPSCOMB: Gentlemen, this is extremely interesting, but the hotel requested that we deliver this room to them at 4:30 in order that they could prepare it for the cocktail party at 6:30, so I am going to turn the meeting over to Mr. Stichter to close it.

CHAIRMAN STICHTER: Before you leave, gentlemen, please, just a moment. I would like to remind you that we have another open forum tomorrow morning. We must get started as promptly as possible in order to be through in time for the golf tournament, and I would like to ask you to come. I think you will find that open forum just as interesting as this.

MR. GEORGE M. WEICHELT (Chicago, Ill.): I just want to suggest before we adjourn that we give a rising vote of thanks to the Moderator and the "Quiz Kids."

. . . The audience rose and applauded . . .

CHAIRMAN STICHTER: The meeting is adjourned.

. . . The meeting adjourned at 4:35 o'clock p. m. . . .

OPEN FORUM

Annual Meeting of International Association of Insurance Counsel
Chairman: WAYNE E. STICHTER, *Toledo, Ohio*

Automobile Insurance Law Committee

Moderators: ALLEN WHITFIELD, *Des Moines, Iowa*
FLETCHER B. COLEMAN, *Bloomington, Ill.*

THURSDAY MORNING SESSION
June 30, 1949

The meeting convened at nine-fifty o'clock a.m., Mr. Wayne E. Stichter, Chairman of the Open Forums Committee, presiding.

CHAIRMAN STICHTER: Gentlemen, we shall not keep the faithful waiting any longer. We will get started with our meeting.

This Open Forum is being held under the auspices of the Automobile Insurance Law Committee, of which Allen Whitfield is Chairman. He will act as Moderator at this program this morning.

We have two papers dealing with questions involving policies. We had arranged for two Moderators, Mr. Whitfield and Mr. Fletcher B. Coleman. Mr. Coleman was unable to be present at our convention, so Mr. Whitfield alone will act as Moderator this morning.

Now, we plan to be through here in time for you to get out to register and play golf or register for bridge or what-not, and we shall appreciate your staying as long as you can. We would like for you to stay all morning. I think you will find we have two very fine papers, and I think you will enjoy the discussion that we will have following these papers.

Without further ado, I want to present to you the gentleman who will act as Moderator, Mr. Allen Whitfield, Chairman of the Automobile Insurance Law Committee. Mr. Whitfield. (Applause).

MODERATOR WHITFIELD: Thank you, Mr. Stichter.

Gentlemen, it is a privilege to participate in a program which, at least in my judgment, may afford to some of us the opportunity of enlarging our educational background and understanding of this illusive subject known as automobile insurance law.

This morning we have two papers, as Mr. Stichter has pointed out, which are in a sense unrelated, and in order to stimulate discussion and keep the discussion reasonably in channels, I believe the way we will handle the meeting will be to have the paper presented and then have the discussion on that particular paper while it is fresh in the minds of all of us.

The subjects which have been selected this morning for discussion and presentation to the group are subjects which we believe are matters of controversy in the courts today, which are matters of major interest to home office counsel for insurance companies and questions which we believe will be of interest to trial attorneys.

The first paper this morning will be presented by Frank O'Kelley, of Tallahassee, Florida. Just a word of background about Frank: Frank is a member not only of the bar of Florida, but the bar of South Carolina, where he practiced a short time after finishing law school at the University of South Carolina. Frank has been engaged actively in the practice of law in Tallahassee, Florida for approximately twelve years. Frank's subject this morning is, "The Cooperation Clause As a Condition Precedent to Liability." It is a pleasure gentlemen, to present to you my friend Mr. Frank O'Kelley. (Applause).

The Cooperation Clause As a Condition Precedent

By A. Frank O'Kelley, *Tallahassee, Florida*

AUTOMOBILE LIABILITY insurance policies, and other liability policies, customarily include, under the heading, "Conditions," a provision, commonly referred to as the cooperation clause, that the insured shall cooperate with the company, and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, and that the insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident. Usually these policies also contain, under the heading "Conditions," a provision that no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the policy.

For the purposes of this discussion, the requirement in the policy relative to the insured furnishing the insurer with notice of the accident is considered as being independent of the cooperation clause.

Let us look for a moment at the general meaning of the terms "conditions precedent," and "conditions subsequent."

In American Jurisprudence[1] conditions precedent and subsequent are classified and defined as follows:

> "Conditions in an insurance policy are of two kinds—precedent and subsequent. As the term 'condition precedent' is commonly understood and technically used, it means a condition precedent to the consummation of the insurance contract, and is one that is to be performed before the contract becomes effective. It calls for the happening of some event or the performance of some act after the terms of the contract have been agreed upon, before the contract shall be binding on the parties, such as that the policy shall not take effect until delivery and payment of the first premium during the good health of the applicant. In the absence of the performance of a condition precedent or the waiver of such performance by the insurer, no right to recover on the policy vests, nor can equity give any relief to the insured or his personal representatives, although it may act in this respect if the condition violated is a condition subsequent. Conditions subsequent are those which pertain not to the attachment of the risk and the inception of the policy, but to the contract of insurance after the risk has attached and during the existence thereof."
>
> It is stated that:
>
> "* * * a condition precedent is one without the performance of which the contract, although in form executed by the parties and delivered, does not spring into life."[2]

As members of the bar, we are interested in the decisions by the courts. It is generally held that substantial compliance with the cooperation clause is a material condition of the policy.[3] Many cases involving the question do not designate the condition as either precedent or subsequent. The following conclusions have been reached from a study of the authorities on the subject:

1. *A substantial compliance with the cooperation clause is stated to be a condition precedent to liability of the insurer by a majority of the courts which apply a specific terminology to the condition.*

2. *The majority of courts treat the condition as subsequent, on the questions of pleading and proof, by holding that a breach of the cooperation clause is an affirmative defense, and that the burden of proof is on the insurer.*

3. *The majority of courts treat the condition as subsequent by holding that the violation of the cooperation clause constitutes a defense only where the insurer was substantially prejudiced by the violation.*

Final Conclusion: *A majority of the courts apply the cooperation clause as a condition subsequent.*

1. A *substantial compliance with the cooperation clause is stated to be a condition*

[1]29 Am. Jur. Sec. 538, p. 435.

[2]29 Am. Jur. Sec. 539, p. 436.

[3]Insurance Law and Practice, Appleman, Vol. 8, Section 4771, 4772, p. 151, 152.

precedent to liability of the insurer by a majority of the courts which apply a specific terminology to the condition.

In the case of *Whittle v. Associated Indemnity Corporation,*[4] (Court of Errors and Appeals of New Jersey, 1943), in a suit by the injured party against the insurer, where there was full cooperation by the named assured, and where an additional assured, who was the son of the named assured, and who was driving alone at the time of accident, returned the car to the family garage without being observed, and then left New Jersey and joined the Canadian Army and was not heard from until approximately two months after the accident, it was held that the policy provisions relative to cooperation were not, as urged, conditions subsequent; that by the very terms of the policy they were made conditions precedent; that moreover, the court had held that they are conditions in the nature of a promissory warranty and that they are conditions precedent to the right of recovery; that the insurer having denied liability in its defenses on the ground that the assured had not fulfilled the stated conditions precedent, the insurer's motion for a directed verdict should have been granted when the plaintiff failed to prove that the assured had fulfilled the conditions precedent upon which appellant's obligation, under its policy, was dependent; that the insurer was entitled, under the policy, to have from its assured, as soon as practical after the accident, all of the prescribed information available to the assured concerning the accident, and there was a breach of the condition by the additional assured.

In the case of *Conold v. Stern,* (Ohio Supreme Court, 1941),[5] the plaintiff filed a supplemental petition in which she sought to require the insurer to satisfy a judgment which she had obtained against the assured. The insurer filed an answer in which it alleged that the executors of the estate of one Luntz, deceased, had recovered a judgment against the assured for the alleged wrongful death of Luntz arising out of the same automobile collision in which plaintiff was injured; that the executors of Luntz had filed a supplemental petition seeking to require the insurer to satisfy their judgment; that the insurer obtained a final judgment in its favor because of the breach by the insured of the cooperation clause; and that such judgment is determinative of the rights of the parties and is a bar to the plaintiff's right to maintain this action. In affirming a judgment overruling a demurrer of the plaintiff to the supplemental answer of the insurer, the Court held that an Ohio statute providing for absolute liability of the insurer must be interpreted to mean that such right is subject to the limitations and conditions of the insurance contract, including conditions subsequent to be performed by the insured after the injury covered by the policy occurs, which conditions become conditions precedent to a right of action on the policy; that the conditions and limitations of the policy are enforceable, not only against the insured but against all persons who seek relief under it, otherwise the statute would violate the due process clause of the constitution; that the authorities are in practical unanimity on this subject; that

> "A clause in an insurance policy requiring the insured's cooperation, aid and assistance in a defense of an action against him is a material condition of the policy, the violation of which by the insured forfeits his rights to claim indemnity under the policy. It is a condition precedent, failure to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy."

Plaintiff contended, however, that the alleged lack of cooperation which was the subject of litigation in the Luntz case, did not occur with reference to or in connection with her claim against the assured and that such lack of cooperation as to the Luntz case could not affect her right to recover. The court answered such contention with these words:

> "Cooperation of the insured with the insurer, in the defense of any claim asserted against it, is alleged to be one of the conditions of the policy. When, as alleged, that condition was broken, the policy came to an end, if the insurer so elected, and it did so elect."

The Court concluded that the right of the assured against the insurer could not be relitigated in this action; that the judgment against him in the former action must be a bar against any third party whose

[4]130 N. J. L. 576, 33 A. 2d 866.
[5]138 Ohio St. 352, 35 N.E. 2d 133, 137 A.L.R. 1003.

right, if any, against the insurer is derived from and dependent upon a valid right of the insured against the insurer.

In the case of *Finkle v. Western Automobile Ins. Co.*[6] (St. Louis Court of Appeals, Missouri, 1930), it was held that the requirement in a policy of liability insurance for cooperation on the part of the assured is valid and enforceable; that aside from the obligations arising from the law of contract, it is at once apparent that a condition of the policy requiring the cooperation and assistance of the assured in the defense of the action brought against him by the injured party, is of the utmost importance in a practical sense; that

> "In other words, the situation calls for nothing more than the application of the familiar rule that the indemnitee, in order to be entitled to recover on his indemnity contract, must fully perform all conditions which by the terms of the contract are made conditions precedent to any liability on the part of the indemnitor.'"

It was stated that a forfeiture of the policy was not involved, for the policy may well have remained in full force and effect as to those losses sustained by the assured where the conditions of the policy had been met, while a recovery may have been defeated as to a particular loss in connection with which the assured was remiss in the performance of his obligations under the contract; that

> "By this we mean that the condition of the policy requiring cooperation by the assured is in the nature of a condition precedent to liability on the company's part for the loss growing out of the claim with the disposition of which the assured's assistance is demanded; * * *"

that a breach of such condition in a given instance does not have the effect of nullifying and vitiating the contract for all times and purposes; that what constitutes cooperation is usually a question of fact; that in the case at Bar, where the assureds had left the city prior to the trial without notifying the company thereof, and without advising it as to their new address, the two ultimate questions to be determined are: first, whether the assured was guilty of bad faith in leaving; and second, whether the company exercised reasonable diligence in ascertaining his whereabouts and in procuring his attendance at the trial, or his deposition for use in lieu of a personal appearance; that there was a clear cut issue for the jury to pass upon, and the garnishee's request for a directed verdict at the close of all of the evidence was properly denied.

There are other cases specifically stating that performance of the cooperation clause is a condition precedent.[8]

There are cases specifically stating that performance of the cooperation clause is a condition subsequent. In *Houran v. Preferred Accident Ins. Co. of New York.*[9] (Supreme Court of Vermont, 1937), while deciding that the giving of notice of accident as soon as reasonably possible was a condition precedent to liability on the part of the insurer, and that the burden was on the plaintiff to show its performance, observed that the cooperation clause comes into effect after the insurer has assumed its contract obligation and has undertaken the defense, and it is therefore in the nature of a condition subsequent, the breach of which is a matter of defense to be pleaded by the defendant.

In the case of *Woodman v. Pacific Indemnity Co.*[10] (District Court of Appeal, California, 1939), although the Court observed that there was no intimation in the answer, and apparently none in the proof, that the assured failed to give timely notice of the accident or failed to cooperate with the insurer in defending the action, it was

[6]224 Mo. App. 285, 26 S.W. 2d 843.

[7]Citing Riggs v. New Jersey Fidelity & Plate Glass Insurance Co., 126 Or. 404, 270 P. 479.

[8]Bachhuber v. Bocsalis, et al (Supreme Court of Wisconsin, 1930) 200 Wis. 574, 229 N.W. 117; Hunt v. Dollar (Supreme Court of Wisconsin, 1937) 244 Wis. 48, 271 N.W. 405; General Casualty & Surety Co. v. Kierstead (Circuit Court of Appeals, Eighth Circuit, 1933) 67 F. 2d 523, on appeal from the District of Nebraska; Riggs v. New Jersey Fidelity & Plate Glass Co. (Supreme Court of Oregon, 1928) 126 Or. 404, 270 P. 479; Durbin v. Lord (Appellate Court of Illinois, 1946) 329 Ill. App. 333, 68 N.E 2d 537; Hartford Accident & Indemnity Co. v. Partridge (Supreme Court of Tennessee, 1946) 183 Tenn. 310, 192 S.W. 2d 701; Bradford v. Commonwealth Casualty Co. (Supreme Court of New Jersey, 1932) 10 N. J. Misc. R. 301, 158 A. 840; Kindervater v. Motorists Casualty Insurance Co. (Court of Errors and Appeals, N. J. 1938) 120 N.J.L. 373, 199 A. 606. State Farm Mutual Automobile Insurance Co. v. Bonacci (Circuit Court of Appeals, Eighth Circuit, 1940) 111 F. 2d 412; Horton v. Employers' Liability Assurance Corp. (Supreme Court of Tenn. 1942) 164 S.W. 2d 1016.

[9]109 Vt. 258, 195 A. 253.

[10]33 Cal. App. 2d 321, 91 P. 2d 898.

said that the giving of timely notice of an accident and of cooperating in its investigation, and the defense of an action based upon it, are not conditions precedent to the validity and enforceability of an insurance policy; that under some circumstances, breach of these obligations by an assured may relieve the insurer from liability; but that such a breach is a matter of defense and should be pleaded by defendant; that the plaintiff in his complaint is not required to anticipate a defense.

In the case of *Western Casualty & Surety Co. v. Weimar,*[11] (Circuit Court of Appeals, Ninth Circuit, Cal., 1938) which was an appeal from the Northern District of California, the insurer contended that the complaint failed to state a cause of action in that it did not adequately allege the performance by the assured and by the injured plaintiff of conditions precedent to recovery on the policy, specifically the performance of the cooperation clause. It was held that the requirements of the cooperation clause are not conditions precedent; they outline conditions subsequent, affirmative matters of defense which the insurer must plead and prove in order to defeat recovery on the policy.

It will be observed that these decisions are based upon the effect of the condition on pleading and proof, a question which will be considered in the next section of this paper.

At least two courts have commented that it seems of little importance whether the cooperation clause is termed a condition precedent or a condition subsequent. In 1946, the Supreme Court of California, in the case of *O'Morrow v. Borad,*[12] where the two automobiles involved in the accident were insured by the same two insurance companies, and where each assured had a claim against the other, it was decided that the insurers should be excused from compliance with the cooperation clauses on the ground of public policy. The Court in discussing the question, observed the holding in *Woodman v. Pacific Indemnity Co.,* supra, that cooperation clauses are not conditions precedent to the validity and enforcement of an insurance policy but are conditions subsequent to be pleaded by the insurer in defense of liability, and also observed that other courts have held such clauses to be conditions precedent to liability, and continued:

> "But regardless of the name given to provisions of this kind, the insurer is ordinarily released from its contract by the total and unjustifiable refusal of cooperation by the insured including unjustifiable refusal of the insured to permit the insurer to make any defense."

In the case of *Glens Falls Indemnity Co. v. Keliher* (Supreme Court of N. H., 1936),[13] the insurer brought a declaratory judgment action to determine whether it was legally bound to satisfy either or both of two judgments recovered by a personal injury plaintiff and her husband against the assured. The assured had gone to the town where the cases were to be tried and had appeared in court when the trials began. Subsequently, however, he became intoxicated and returned to his home and thereafter avoided an agent of the insurer until the trials were concluded. In discussing the cooperation clause, the court held:

> "Whether a condition of the kind here involved shall be called a condition precedent as in *Bachhuber v. Boosalis,* 200 Wis. 574, 229 N.W. 117, or a condition subsequent as in *Medical, etc., Co. v. Light,* 48 Ohio App. 508, 194 N.E. 446, is perhaps a barren speculation, but since the effect of the assured's failure to cooperate is to relieve the insurer from an obligation which has already attached, subject to possible defeasance, it seems more in accord with the customary use of English terms to call this provision a condition subsequent. It is, in either event, a 'material condition of the policy' the violation of which by the assured destroys the right to claim indemnity thereunder."

The lower court had announced that it found it to be more probable than otherwise that liability would have been established if the assured had testified, but as to any other effectual assistance he might have given in the conduct of the case, the court made no findings. In view of this announcement, counsel for defendants argued that the absence of the assured from the trial was not harmful and that his refusal to cooperate was not material. In answering this contention the court said:

[11] 96 F. 2d 635.
[12] 27 Cal. 2d 794, 167 P. 2d 483.
[13] 88 N. H. 253, 187 A. 473.

"There are both practical and theoretical answers to this argument. Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial. Such absence, if not adequately explained, is a circumstance, 'chiefly persuasive as distinguished from probative in its effect' (*Login v. Waisman*, 82 N.H. 500, 502, 136 A. 134, 136), which normally affects the decision of the jury upon all questions submitted to them. Even if the liability of a defendant were admitted or conclusively established, it cannot be doubted that the mental attitude of the jury in assessing damages would be influenced by his unexplained absence from the courtroom. Due regard for the current demand for realism in the administration of the law does not permit the adoption of the defendants' argument that the plaintiff was not prejudiced by Keliher's absence from the trial of the case against him.

"The theoretical answer to the defendants' argument, which is equally complete, was well stated by Cardozo, J. in *Coleman v. Casualty Company*, 247 N. Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443, as follows: 'The argument misconceives the effect of a refusal. Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfil a condition upon which obligation is dependent.' "

The court held that a breach of condition is no less decisive in its effect than a breach of warranty with reference to which it had previously held that if a fraudulent statement in an application is to be regarded as a warranty, the question of materiality is not one of fact for the jury but one of law for the court in determining whether the statement is material in the sense that it was intended by the parties to be a part of the contract; that this view restricted the question to one of construction of the policy itself; that in other words while the law may disregard trivial and innocent breaches of condition, and while the character of the assured's conduct and the importance of its probable effect upon the interests of the insurer may be considered for the purpose of determining whether there has been a substantial breach, all questions of actual harm and probable effect become immaterial when a breach of condition has been definitely established.

2. *The majority of courts treat the condition as subsequent, on the questions of pleading and proof, by holding that a breach of the cooperation clause is an affirmative defense, and that the burden of proof is on the insurer.*

More important than the terminology used, is the effect of a breach of the cooperation clause. Generally, the plaintiff in an action on an insurance policy need not allege the performance of conditions subsequent, nor negative matters of defense, but must allege compliance with conditions precedent or a waiver thereof.[14] Breach of a condition subsequent, as distinguished from a condition precedent, if relied upon by the insurer as a defense to an action upon the policy, must be specially pleaded.[15] The insurer has the burden of proof of a condition subsequent,[16] while the burden of proof of the condition precedent is upon the one seeking to enforce the insurance policy.[17]

The courts almost unanimously hold that the breach of the cooperation clause is an affirmative defense to be pleaded by the insurer, and that the burden of proof is on the insurer,[18] although there are a few cases holding that the plaintiff must prove that the assured complied with the cooperation clause.[19] It thus appears that, insofar as pleading and proof are concerned, the courts treat a breach of the cooperation clause as a condition subsequent.

3. *The majority of courts treat the condition as subsequent by holding that the violation of the cooperation clause constitutes a defense only where the insurer was substantially prejudiced by the violation.*

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[14] 29 Am. Jur. Sec. 1418, p. 1061.
[15] 29 Am. Jur. Sec. 1424, p. 1067.
[16] 29 Am. Jur. Sec. 1440, p. 1078.
[17] 29 Am. Jur. Sec. 1440, p. 1080.
[18] Insurance Law and Practice, Appleman, Vol. 8, Sec. 4787, p. 186, 187; 72 A.L.R. 1452, 1453; 98 A.L.R. 1468; 139 A.L.R. 776, 777; 29 Am. Jur. Sec. 1424, p. 1068.
[19] Whittle v. Associated Indemnity Corporation, 130 N.J.L. 576, 33 A. 2d 866; Rochon v. Preferred Accident Ins. Co. of N.Y., 118 Conn. 190, 171 A. 429. (But see later case of Curran v. Connecticut Indemnity Co. of New Haven, 127 Conn. 692, 20 A. 2d 87).

There is general agreement that the breach, to be available as a defense, must be of a substantial or material nature.[20]

It will be noticed from a discussion of the cases that while there is impressive authority to the contrary, the majority of courts deciding the question hold that a breach of the cooperation clause constitutes a defense only where the insurer was substantially prejudiced. The cases on this question do not specifically state that a determination of whether the condition is precedent or subsequent is determinative of the question of whether there must be prejudice in order to defeat a recovery. There are cases which conclude that the condition is precedent and hold that in order to defeat a recovery the insurer need not be prejudiced.[21] It would seem that in those cases there was no necessity for the court to determine whether the condition was precedent or subsequent unless such determination was necessary in determining that such breach need not be prejudicial. In one case[22] decided by the Supreme Court of North Carolina in 1948, it was held that although the policy termed the cooperation clause a condition precedent, it is in no proper sense a condition precedent, but if properly called a condition, is a condition subsequent; that upon the happening of an accident the rights of the insured attach, subject to being defeated by a substantial failure to cooperate in a matter essential to the defense. It, therefore, follows that in a condition precedent it is immaterial whether the insurer was prejudiced whereas in the case of a condition subsequent prejudice must be present. This view is supported by the general authority which holds that it is necessary in order to recover on a contract to show a substantial compliance with the conditions precedent contained in such a contract.[23] As a corollary, there need be no prejudice if there is a substantial or material breach of the contract sued upon.

The view that in a condition precedent it is immaterial whether the insurer was prejudiced also seems consistent with the holdings in other cases which have been discussed which state that the condition is precedent.

It is observed that in only a few cases holding that the insurer must be prejudiced by the breach in order to defeat recovery, it is also specifically stated that the condition is precedent[24] and these decisions are frequently based on the questions of pleading and proof. On the other hand, in a number of cases holding that prejudice is immaterial, it is stated that performance of the cooperation clause constitutes a condition precedent.[25] In many cases on the question of prejudice, the courts do not specify whether the condition is precedent or subsequent.

Of cases holding that in order for the insurer to avoid liability, it must be prejudiced by the failure of the assured in the performance of the cooperation clause, the case of *Cameron v. Burger* (Supreme Court of Pennsylvania, 1938)[26] is frequently cited. There, following an earlier decision,[27] it was held that the insurer had the burden of proving, not merely a breach of the condition, but that the breach was such as to result in substantial prejudice and injury to its position. The assured had voluntarily disappeared prior to trial and it was held that this was prejudicial, as she was not only an essential witness at the trial, but the only witness for the defense, and her aid was necessary for the preparation and trial of the suits; her voluntary disappearance left the insurer without a defendant and a defense; even if the insured's liability to the plaintiff were clear, the insurer was prejudiced by her failure to contest the important issue of the amount of damages to be awarded.

In the case of *State Automobile Insurance Co. v. York* (Circuit Court of Appeals, Fourth Circuit, North Carolina, 1939),[28] the injured plaintiff had recovered judgment against her husband, the insured, and brought suit to recover under his policy.

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[20]Insurance Law & Practice, Appleman, Sec. 4773, p. 156.

[21]Kindervater v. Motorists Casualty Insurance Co., 120 N.J.L. 373, 199 A. 606; Hunt v. Dollar, 224 Wis. 48, 271 N.W. 405; Whittle v. Associated Indemnity Corporation, 130 N.J.L. 576, 33 A. 2d 866.

[22]MacClure v. Accident & Casualty Ins. Co., 229 N.C. 305, 49 S.E. 2d 742.

[23]12 Am. Jur. Sec. 328, p. 883.

[24]Riggs v. New Jersey Fidelity & Plate Glass Co., 126 Or. 404, 270 P. 479; Rochon v. Preferred Accident Ins. Co. of N. Y., 118 Conn. 190, 171 A. 429.

[25]Hunt v. Dollar, 224 Wis. 48, 271 N.W. 405; Whittle v. Associated Indemnity Corporation, 130 N.J.L. 576, 33 A. 2d 866; Kindervater v. Motorists Casualty Insurance Co., 120 N.J.L. 373, 199 A. 606; Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N.E. 367, 72 A.L.R. 1443.

[26]336 Pa. 229, 7 A. 2d 293.

[27]Conroy v. Commercial Casualty Insurance Co., 292 Pa. 219, 140 A. 905.

[28]104 F. 2d 730.

The insurer contended that there was a failure of the insured to cooperate. The insured had given a statement to the insurer's representative on the day following the accident and later gave a statement to the insurer's attorney which was more favorable to the injured plaintiff, his wife. It was held that, to relieve the insurer of liability on the ground of lack of cooperation, discrepancies in statements by the insured must be in bad faith and must be material in nature and prejudicial in effect; that the discrepancy in the statements was not sufficient to establish lack of cooperation so conclusively as to justify direction of verdict for the insurer. The court observed that where the injured plaintiff and the insured are members of the same family, the conduct and testimony of the parties should be carefully scrutinized by court and jury, since the interest of the parties is not really adverse, but held that the policy is not avoided merely because the sympathy of the insured is with the injured members of his family rather than with the company which insured him.

The courts in a number of other states have reached the conclusion that in order to establish a defense under the cooperation provision, the insurer must show that the failure of the insured to cooperate with it was of such gravity that its rights were prejudiced.[29]

Of the cases holding that prejudice need not be shown, perhaps the leading case is that of *Coleman v. New Amsterdam Casualty Company*,[30] decided in 1928 by the New York Court of Appeals, in which the opinion was written by the late Mr. Justice Cardozo, then the Chief Justice of that Court. An officer of the assured corporation, which was a drug store, advised the insurer that there was a mistake in compounding a prescription, but refused to furnish any other information unless the insurer would agree to pay any judgment recovered against him, as well as any judgment recovered against the insured corporation. Although the opinion does not specifically call the cooperation clause a condition precedent to recovery, this seems to be the clear intendment. After holding that there was such a refusal of the assured to cooperate as to vitiate the policy of lia-

[29]Medico v. Employers Liability Assurance Corp., 132 Maine 422, 172 A. 1 (Unimportant variances between statement of insured to insurer and his testimony in court held not failure to cooperate); State Farm Mutual Automobile Insurance Co. v. Koval, (C.C.A., Okla.) 146 F. 2d, 118 (Affirmed trial court's finding insurer not prejudiced by assured's failure to attend trial, after being requested, and agreeing, to do so, where insurer admitted legal liability in tort actions so as to exclude from jury unfavorable information about accident); Associated Indemnity Corp. v. Davis, (C.C.A., Pa.) 136 F. 2d 71 (No prejudice was found when assured, after giving statement about accident, refused repeated requests for consultation until case was called for trial and counsel for insured withdrew from case, but after a continuance was ordered, assured offered to cooperate and was present at trial and represented by his own counsel); American Fire and Casualty Co. v. Vliet, 148 Fla. 568, 4 So. 2d 862, 139 A.L.R. 767 (Verdict finding no failure of cooperation affirmed, where assured failed to attend trial, 750 miles from her home, at her own expense when she had no funds and where policy was construed as not requiring attendance of assured at own expense); Riggs v. New Jersey Fidelity & Plate Glass Ins. Co., 126 Or. 404, 270 P. 479 (The following actions of assured held immaterial, or not prejudicial: 1. failure to persuade mother-in-law not to sue; 2. failure to obtain presence at trial of witness; 3. giving news to press during trial that, but for insurance, mother-in-law would not have sued, there being no claim that the jury knew this, or that it affected the trial or result; 4. evincing hope to insurer's attorney during trial that plaintiff would recover; 5. considering himself liable and requesting insurer to settle); Francis v. London Guarantee and Accident Co., 100 Vt. 425, 138 A. 780 (Assured's deliberately false statement to insurer following accident which might have induced insurer to settle without contest, where insurer discovered truth before trial, and chose to go on with trial, held not prejudicial); Brooks Transportation Co. v. Merchants' Mutual Casualty Co. (Delaware), 6 W. W. Harr. 40, 171 A. 207 (A mere discrepancy in minor detail or an honest mistake between the several statements of the facts surrounding the accident would not be sufficient to avoid the policy, but a material or intentional or fraudulent variation of the statements would constitute a failure to cooperate); Bernadich v. Bernadich, 287 Mich. 137, 283 N.W. 5 (That insured gave insurer two versions of accident, held not prejudicial by depriving it of opportunity to investigate and make settlement before trial, where two weeks elapsed after assured's final version before trial, and insurer made no effort to secure a continuance); Levy v. Indemnity Insurance Co. of North America (La. App.) 8 S. 2d 774 (No violation of the cooperation clause appeared where the assured, who was a brother of the injured plaintiff, an incompetent, gave plaintiff's attorneys a statement of the facts of the accident and furnished the money with which to finance the suit); Glade v. General Mutual Insurance Assn., 216 Iowa, 622; 246 N.W. 794 (A demand upon insurer to pay damages, and acceptance of service of notice, held not violative of cooperation clause, which was limited, and not prejudicial); Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 P. 393 (Discrepancies between testimony of officer of assured corporation at inquest and on trial, which fact was shown at trial for impeachment, not wilfully false, nor anything more than the result of mistake, nor shown to affect verdict, would not avoid policy).

[30]247 N. Y. 271, 160 N.E. 367, 72 A.L.R. 1443.

bility insurance, the court discussed the point made by plaintiff that the default should be condoned since there was no evidence that cooperation, however willing, would have defeated the claim for damages or diminished its extent, and observed that for all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free.

The court held as follows:

> "The argument misconceives the effect of a refusal. Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent."

Another leading case is that of *Kindervater v. Motorists Casualty Insurance Co.*[81] (Court of Errors and Appeals of New Jersey, 1938). There suit was brought against the insurer by the injured plaintiff, who had previously obtained a judgment against the assured in whose car the plaintiff was riding at the time of the accident. The accident also involved two other automobiles. About two weeks after the mishap, the assured, at the instance of a member of the family of the driver of one of the other cars, made a written admission of liability in the accident. The question presented was whether this breached the cooperation clause of the policy so as to forfeit the benefit thereof. In answering this question in the affirmative, the court held:

> "This covenant is in the nature of a promissory warranty—a condition upon which the liability of the insurer to render indemnity depends. The insurer's obligation is expressly conditioned upon 'compliance with the provisions' set out in the policy. That is a condition precedent to recovery upon the policy. This particular provision is obviously an essential term of the contract; and its breach operates as an avoidance of the insurer's contractual liability."

The trial judge had decided that the policy condition in question provided a forfeiture by the assured from all his rights against the insurer under the policy only as to the liability for which he had assumed the responsibility. He found that the assured was undoubtedly remiss in the performance of his obligations under the policy with respect to the driver of the other car, while he was not remiss in his obligations to the insurer so far as these plaintiffs are concerned. This ruling was held to be error. The assured was enjoined against the voluntary assumption of "any liability"; this is a necessary corollary of the stipulations reserving to the insurer the exclusive direction and control of defense of claims so made. A violation relieves the insurer from policy liability, regardless of whether actual prejudice has ensued therefrom, citing *Coleman v. New Amsterdam Casualty Co.*, supra. The court continued:

> "An interpretation that would require a demonstration of substantial detriment to the insurer, as the result of the breach of such a condition, would seriously impair its practical efficacy. It suffices if the condition has been breached in a material or essential particular."
>
> * * *
>
> "The insurer's liability was in clear and unmistakable language made contingent upon the fulfilment of the specified conditions. And the assured has no just cause for complaint if he be held to the substantial performance of duties thus freely undertaken. They are of the very essence of the contract. It is not of the judicial function to emasculate a material provision solemnly and understandingly incorporated in the contract by the parties, and within their competency. The terms of the contract, as understood by a person of reasonable intelligence, measure the insurer's obligation; and there can be no recovery, in the absence of the elements of estoppel or waiver, where the assured has breached in matters of substance a reasonable protective provision made the determinative of liability. This regulation of the assured's conduct is essentially reasonable. Without these protective provisions, the insurer would be at the mercy of dishonest and culpably indifferent policy holders, for thereby it would run the risk of impoverishment to the detriment of honest claimants. Neither the public nor private interest is served by laxity in this regard."

[81] 120 N.J.L. 373, 199 A. 606.

It was held to be wholly irrelevant that the plaintiff was not a party to the assured's assumption of liability and did not take advantage of it in the assertion of the claim ultimately reduced to judgment. The test is whether the assured could have recovery in a direct action against the insurer. The rights of the plaintiff rise no higher than his.

In the case of *Royal Indemnity Co. v. Morris* (Circuit Court of Appeals, Ninth Circuit, 1930),[32] where an assured had declined to permit the insurer to make any defense in his name, it was argued that the insurance company might have protected itself by intervention. The court answered this contention as follows:

> "But while intervention might have afforded it a measure of protection, clearly in that position it would be at a disadvantage; and, besides, we are here discussing, not the question whether in spite of Gomez's default the insurance company could have protected itself, but whether he forfeited his rights by violating a material condition of the policy."

In the case of *United States Fidelity & Guaranty Co. v. Wyer* (Circuit Court of Appeals, Tenth Circuit, 1932),[33] on appeal from the Northern District of Oklahoma, it was contended that the insurer was bound to show that the failure of cooperation affected the judgment in the damage suit in order to defeat liability. After discussing authorities on the question, the court held:

> "But we are impressed that noncooperation as shown in this case was of itself a well-founded defense. It was sufficient for the reason, if for no other, that cooperation was stipulated in the contract to be a condition to liability."

There are other decisions to this effect in the states of New Jersey, Wisconsin, New Hampshire, New York and Vermont.[34] While not directly so holding, the Circuit Court of Appeals, Ninth Circuit, in 1948, indicated that this was the better rule in *Home Indemnity Co. of New York v. Standard Accident Insurance Co. of Detroit.*[35]

This discussion has not considered the effect of the cooperation clause on the rights of an injured plaintiff under compulsory insurance statutes.

Final Conclusion: *A majority of the courts apply the cooperation clause as a condition subsequent.*

While few courts which discuss the nature and effect of the cooperation clause, specifically term it a condition precedent or subsequent, a majority of the courts, in making an application thereof, treat it as a condition subsequent rather than a condition precedent.

MODERATOR WHITFIELD: Gentlemen, I think you will agree with me that Mr. O'Kelley has outlined very adequately the general problems that are involved in the cooperation clause.

I should like to suggest before we start the discussion of this paper that the gentlemen in the back part of the room move a little forward so that they can participate in this discussion a little more easily. If you will please do that, I would appreciate it.

We are going to handle this discussion in this way, gentlemen: We are going to discuss Mr. O'Kelley's paper while it is fresh in our minds, and then proceed with the next paper.

Now, gentlemen, the meeting will be thrown open for questions with respect to the problems which have been raised by Mr. O'Kelley's paper. Those of you who have a question I'd like to recognize at this time.

MR. W. H. HOFFSTOT, JR. (Kansas City, Mo.): I think one of the benefits is to take current cases, problems that arise, and get the benefit of the speaker's opinion. I have a current one that arose just the week I left home. As a matter of fact, I have not even seen our assured as yet. Really the problem in my mind so far, and possibly others, is: To what extent is cooperation with a member of the family lack of cooperation with our insurance company?

I will give you the facts of the background as I know them at this time. As I say, it is very current so far as we are concerned. The auto accident occurred with

[32] 37 F. 2d 90.
[33] 60 F. 2d 856.
[34] Glens Falls Indemnity Co. v. Keliher, 88 N.H. 253, 187 A. 473; Houran v. Preferred Accident Ins. Co. of New York, 109 Vt. 258, 195 A. 253; Hunt v. Dollar, 224 Wis. 48, 271 N.W. 405; Whittle v. Associated Indemnity Corp., 130 N.J.L. 576, 33 A. 2d 866; Shafer v. Utica Mutual Insurance Co., 248 App. Div. 279, 289 N.Y.S. 577.
[35] 167 F. 2d 919.

our assured driving her sister and her husband, our assured living in Dallas, Texas, the occupant or driver of the second car living in Minneapolis, Minnesota, the accident occurring in Clay County, Missouri, in which the husband was killed and the sister was injured. Our assured was not injured. So far as I know, the liability is pretty definitely on the Minneapolis man and not our assured—at least, I hope so.

Now, suit was instituted in our State Court in Clay County, the scene of the accident. They apparently knew that our assured came back on Decoration Day to visit the grave of her husband in Caldwell County, Missouri, and so when she came back to Missouri and went to the home of her sister in Caldwell County, Missouri, suit was filed and service obtained upon her, the suit being by the sister against the sister.

Apparently plaintiff's counsel (and this all transpired before we learned anything of it) were a little uncertain as to their venue, and so by pre-arrangement of some sort, just what we don't know as yet, the plaintiff's attorney requested the plaintiff's sister to come in to Kansas City for a medical examination and to bring her sister with her. They went to the doctor's office and then over to the plaintiff's attorney's office, and prior to that time, I might say, they had taken the statement of our assured, also without any knowledge upon our part, and what the statement contains, God only knows—God and the plaintiff's attorney.

VOICE: You had better settle that case. (Laughter).

MR. HOFFSTOT: I think the gentleman is probably right that we should find out the facts first, but the point is they went to the attorney's office and then again by some pre-arrangement which we do not know they told our assured that to transact some legal business it would be necessary for her to go across the river just a little way into Clay County. She went with one of the plaintiff's attorneys, sat there in the car until the sheriff of Clay County came and served her in Clay County, venue of the suit. It is at that point that we learned there is the lawsuit and that our assured is back in the community, and so on.

Now, of course, she has given a statement to the plaintiff's attorney. I sent a young man up and have interviewed her to find the facts as to what transpired. I might add also they served a notice to take her deposition the day before I left, and then the plaintiff herself called me the day before I left by long distance telephone to tell me that her sister had had a heart attack and could not attend the deposition. I can't refrain from saying that I suggested to the sister it was certainly too bad her lawsuit brought on the heart attack.

But be that as it may, what I am wondering is, of course they could have obtained service on our non-residence service statute. It wasn't necessary to go through all these machinations that they did. They did it with the full consent and, our client says, the ignorance of our assured. She didn't know what it was and she didn't know she was supposed to tell the insurance company she was there. She didn't know what to do, so she didn't do anything.

Now, to what extent, particularly where the family relationship exists, can our client's apparent eager cooperation with her sister and her counsel—she says innocently—be held to be lack of cooperation with us, bearing in mind that they could have obtained service through the legitimate means.

MODERATOR WHITFIELD: If I might paraphrase your question, I think we might divide it into two parts. One is the practical question, shall you settle the lawsuit or not, and I think there has been an expression of opinion on that subject, and now we will ask Mr. O'Kelley to give you a technical judgment on whether or not the facts you have outlined would constitute lack of cooperation under the cooperation clause in the policy. Mr. O'Kelley.

MR. O'KELLEY: My recollection is that at least one court has held that submitting yourself to the jurisdiction of the court is not lack of cooperation. I don't recall that citation right now. There was a case from Louisiana in which three brothers were in a car. Two of the brothers were insureds under the policy and a third one was seriously injured. One of the assureds was appointed guardian for the injured brother who was an incompetent. The other brother who was in the car with him at the time of the accident furnished very freely to the plaintiff's attorney all information concerning the accident and also advanced the money necessary to finance the lawsuit, and the Appellate Court in Louisiana held

that that was not a failure to cooperate because the insured had also furnished the insurer the same information which he had furnished the insured's attorney.

You have, it seems to me, also another problem or another question there, and that is whether you have had notice of accident, which, as I understand, is a condition precedent. It depends somewhat on the state you are in.

MODERATOR WHITFIELD: Does that help you in your question? You can see that we not only have the fact that your failure to prevent the sister from suing does not constitute lack of cooperation, but, under the decision that has been referred to by Frank, your assured can help the plaintiff get service, as I understand it. That is the effect of that reference.

MR. S. BURNS WESTON (Cleveland, Ohio): I have noticed a trend recently upon the part of some plaintiffs' counsel to get statements of admission of liability from truck drivers or agents of the assured. Do you find any cases in which that sort of an admission, the admission of an agent of the assured, has been regarded as lack of cooperation and chargeable to the assured?

MR. O'KELLEY: Let me ask you this: Wouldn't, under the onmibus clause, the driver be an additional assured? I think the cases hold that an assured, whether he is a named assured or an additional assured, must cooperate and that his failure is just as great as that of the named insured. I don't recall the case involving agency other than the named insured.

MODERATOR WHITFIELD: May I ask Frank to get the specific point directly answered? Does an admission by the agent under such circumstances, that is, the truck driver, constitute under the decisions a lack of cooperation?

MR. O'KELLEY: Well, not considering the question of agency, whether there was authority to make that admission as an agent, I think that that would be lack of cooperation.

MODERATOR WHITFIELD: In other words, do I understand your view of the decisions to be that if the assured admits liability, that constitutes lack of cooperation?

MR. O'KELLEY: Yes, though I think there is authority to the contrary.

MR. VICTOR C. GORTON (Chicago, Ill.): I think on that very point we should bear in mind that courts have pointed out the distinction between admission of liability as the policy states it and admission of fault for the accident. I think the courts have held that where the driver admits that he was at fault, that is not an admission of liability in violation of the policy, and, from a practical standpoint, it much more often occurs that there is an admission of fault by a driver than an admission of liability, which is a sort of a legal term.

MR. O'KELLEY: Then you have the admission of facts which might lead to an admission of liability but is not an admission of liability. What I mean is he admits that the facts are true and furnishes those facts to the plaintiff or his attorney, and those facts show that he is liable, although he hasn't made any decision on the subject.

MODERATOR WHITFIELD: Any other questions, gentlemen?

MR. EDGAR A. NEELY (Atlanta, Ga.): On the question of an admission by an agent out of the presence of the principal, is that sort of an admission admissible as against the principal?

MR. O'KELLEY: That is a question of agency rather than one of failure to cooperate.

MR. NEELY: Well, the admission, I mean, would not be admissible, would it, as affecting the principal?

MR. O'KELLEY: I would think not.

MR. RICHARD C. MASTERS (Lansing, Mich.): In those states in which they have an ownership statute making the owner liable if the car is driven with his permission the company would be stuck regardless of the cooperation of the driver, would it not?

MR. O'KELLEY: Well, we have that situation in Florida, and they have held that there must be prejudice, but if there is prejudice then there may be no recovery. Now, that is distinguished from a compulsory insurance statute, such as in Massachusetts, I think.

MR. MASTERS: I can see where there would be prejudice as far as the case of the driver is concerned, but the owner of the vehicle would not have been guilty of any lack of cooperation. I wondered if there was any defense in that type of case. We run into it occasionally.

MR. O'KELLEY: It is my thought that that statute wouldn't affect the general subject.

MR. S. BURNS WESTON (Cleveland, Ohio): Mr. Chairman, related to that question, as a little more subtle refinement being used, I find, too, where they extract from the plaintiff the statement that in the course of conversation immediately following the accident either the agent or the insured directly says, "Oh, don't worry about it. I am insured. You will be taken care of." Does that make any refinement that changes your opinion?

MR. O'KELLEY: There are a good many cases where an admission that you are insured is not a breach of the cooperation clause.

MR. WESTON: Is not?

MR. O'KELLEY: Is not a breach.

MODERATOR WHITFIELD: Are there any other questions, gentlemen?

MR. ROBERT W. LAWSON, JR. (Charleston, W. Va.): If an insured claims that he has not been involved in the accident but, nevertheless, suit is instituted against him and the insured continues to insist that his machine was not involved and the jury returns a verdict against that insured, would that be such a breach of the cooperation clause that if you had given him prior notice to the effect that if a verdict were returned against him you would deny liability, do you think that that would stand up?

MR. O'KELLEY: My answer would be yes, that is a breach of the cooperation clause. Now, there was a case in Oklahoma, the Circuit Court of Appeals, I think, involving an Indian man named Buffalo, and he and his driver both denied that they were involved in any accident. However, before the time of trial they admitted that they were in an accident, and the court held that there was no prejudice, as I recall that decision. However, it seems to me if you can definitely prove later that there was an accident, whereas your insured denied being in an accident, that is definitely a failure to cooperate.

MR. WILLIAM H. BENNETHUM (Wilmington, Del.): In the case of an owner-operator being involved in an accident, arrested for a breach of one of the motor vehicle laws, he is in a hurry to get out of the state and he finds he can get rid of that case by the payment of a $10.00 fee, would the plea of guilty in the criminal action be considered as lack of cooperation, assuming that that plea of guilty in whatever jurisdiction in which you are trying your civil case would be admissible?

MR. O'KELLEY: There is a case on that, but I can't remember the result which was reached, but my recollection is that in that state the plea of guilty was admissible in evidence in the civil suit. I just don't remember the result that was reached, I am sorry.

MODERATOR WHITFIELD: I should like to comment on this paper by pointing out that again we have the courts dealing with the technical language of an insurance policy reciting that lack of cooperation is "a condition precedent," and where the effect of the decisions, at least as summarized for us by Mr. O'Kelley in a majority of the jurisdictions, is to rewrite the language of the insurance policy to read in effect "a condition subsequent."

Now, I should like to ask Mr. O'Kelley if, based upon his study of the cases and his reasoning, he thinks that the use of the words "condition precedent" in a policy represent a true and accurate summary of the intent of the parties.

MR. O'KELLEY: Well, when you speak of intent of the parties, I think that very few insureds ever read their policies, and these courts talk about the solemn contract between the parties, whereas I think it is pretty well an unilateral situation.

Getting down, though, to your specific question, there is a case, another North Carolina case, in 1948, as I recall, in which it is held that the attempt by mere nomenclature to convert what is really a promissory warranty into a condition precedent is dealt with in Williston On Contracts, and they hold that regardless of what you call it in your policy, that it is a condition subsequent regardless.

MODERATOR WHITFIELD: Is that the *MacClure v. Accident & Casualty Insurance Company* (Supreme Court of North Carolina, 1948) 229 N. C. 305, 49 S. E. 2d 743?

MR. O'KELLEY: That is the case decided about eighteen months ago.

MODERATOR WHITFIELD: Well, now following up, Frank, this discussion, what do you think, is it wise to try to take the fuzz out of the language of these policies by getting words such as "conditions precedent" rephrased to "condition subsequent" to correspond to what the actual intent of the parties is, or the intent of the unilateral contract?

MR. O'KELLEY: Well, since the states are not unanimous in their decisions, I would make my wording just as I want it and hope for the best, because some of the states do go right down the line with you—Connecticut and New Jersey, for instance, as I recall.

MODERATOR WHITFIELD: Any other questions, gentlemen?

MR. PAUL McGOUGH: I just want to announce your Nominating Committee was in session last evening. We are going to start at 11:00 o'clock this morning in the room just outside the door on the left as you go out. We will meet again late in the afternoon after the golf match and then again sometime during the evening. We are anxious to have everyone who has any views on the question of nomination of candidates come in and express your views, so please come in at 11:00 o'clock this morning, late this afternoon and after the dinner this evening.

Thank you.

MODERATOR WHITFIELD: Thank you very much, Paul.

Summarizing the discussion which we have had, I think it is apparent that again we have in the construction of the insurance contract a split of authority in the various jurisdictions; that we have, perhaps, a lack of understanding and clarity among the decisions as to the true meaning of the words "condition precedent" in the contract. We have certainly evidenced in the summary of the authorities again the trend of decisions to keep the insurance company on the risk if there is any reasonable way to do it, and sometimes the way to do it is stretched up to the upper limits of the word "reasonable."

Thank you very much, Frank, for your participation in this discussion.

Now, gentlemen, our next paper is to be presented for us this morning by Mr. James Dempsey, of White Plains, New York. I have made a little inquiry about Jim, and I find that he has been practicing nearly a quarter of a century. That permits him to say that he is one of the venerable members of the bar. He took his training at New York University and Colgate. He was active in the State District Attorney's office while he was in the early stages of his private practice.

The subject he is going to present this morning is, without doubt, one of the most controversial subjects that is under discussion today. Without further introduction, I want to present Jim Dempsey, who is going to discuss the subject, "Preventing Liability in Excess of The Policy Limits." (Applause).

Preventing Liability in Excess of Policy Limits

By James Dempsey, *White Plains, N. Y.*

"A CONTRACT is a contract." This is one of the trite colloquialisms used so frequently by laymen, lawyers and jurists. Such expression undoubtedly belongs in the same category as "Possession is nine points of the law" or "Three's a crowd." We know, far too well, that all too frequently possession has no vantage from any legal aspect. In fact, possession might well be criminal, rather than legal. We well know that two may constitute a crowd, and a thousand people might constitute a small gathering.

The validity and the effectiveness of a contract, its construction, its interpretation, not only with respect to the signatories to the agreement, but to others affected by its provisions, have been under advisement ever since the common law gained its first

impetus from the reluctant hands of King John at Runnymede.

Not so long ago, a visitor at a State mental institution chanced upon a man in white coat and trousers, and inquired with proper deprecation, "My good man, how long have you been an inmate in this asylum?" With great restraint and with considerable dignity the man replied, "Madam, I want you to know that I am not an inmate at this institution. I am one of the senior psychiatrists on the staff." The lady was, of course, dismayed and wishing to be appropriately apologetic said, "My, my, please forgive me. I did not know. It just goes to show that one cannot judge by appearances."

Indeed, that is obviously true with respect to a contract. It so often happens that one cannot judge a contract by appearances. We are here concerned primarily with an insurance contract which contains the standard provisions, subject to statutory regulations in the divers States. Upon the face of the contract, it purports to be an agreement between an insurance company, duly authorized to write such contract, and an insured who, for a specified premium, has acquired certain protection and indemnity. Just as the amount of the premium is defined, so is the extent of the protection and indemnity.

When I was requested to make some research into the subject of "Preventing Liability in Excess of Policy Limits," it seemed that the subject resolved itself *sine qua non* into the realm of the obvious: To prevent recoveries in excess of policy limits, one should have larger policies. The difference in premiums between the standard $5,000/$10,000 policy and the $100,000/$300,000 policy is so small that it is quite incomprehensible to me why more insurance agents do not impress upon an insured, the advisability of increased coverage, or why more insureds do not insist upon adequate policy protection. To prevent recoveries in excess of policy limits, it would take a lawyer of the greatest audacity and utmost temerity to suggest that we might endeavor to obtain smaller verdicts. However, with the trend that has been significant from one end of the country to the other, in keeping with dollar depreciation and with the realization that trial by court and jury is administered through human agencies, possessed of all human emotions, verdicts might well soar beyond anticipations.

The Home Office officials, the men in active service in the field, and the attorneys who with recondite capabilities and comprehension engage in the obtruse perplexities of legal combat, know that verdicts are as frequently excessive as inadequate. It all depends upon the point of view.

Excess recoveries, with their subsequent ramifications, have occasioned a tremendous amount of concern, if not confusion and consternation, to all parties affected.

A resourceful lawyer recently remarked in the trial of a law suit, that his astute adversary, in defiance of accepted standards, could carry water on three shoulders. Indeed there are three concepts of the labyrinthian consequences of excess recoveries:

First: The injured party, who by novation is the principal beneficiary of the insurance contract to which he is not even a party. He has been successful in obtaining a verdict upon which he seeks to obtain payment. He may be alone in this effort. There may be presented the *quid pro quo* of the claimant cooperating, hand in glove, with an excess insurer, in an effort to compel a primary insurer to pay a judgment in excess of the limits of the primary policy. It is through the efforts of the claimant to have the judgment converted into cash at par, that the rights and responsibilities of the parties to the contract, the insured and the insurance company, enter into judicial purview.

Second: The insured, who is confronted with the payment of a judgment in excess of the limits of his policy. When he acquired the policy he became invested with a level of security, but he relinquished certain privileges perhaps to his detriment. To him, such a contract is ambivalent. He has agreed that all investigations be conducted by the insurer. He has consented that all settlement negotiations be delegated to his insurance representative. He has waived the right to select his own counsel, although he may have been notified that he is entitled to have counsel of his own choosing available. Accordingly, the insured has a right to rely implicitly upon his carrier for compliance, not only with the letter of the contract, but with the spirit of it, so that the insured may benefit to the maximum extent, intended by the provisions of the policy.

Third: The insurer, who is confronted with the expressed terms of the policy, and

with the insurance laws and regulations which are read into the policy by legislative enactment. An insurer cannot prosper if it is to be confronted with exposures running into six figures, upon contracts which had ultimate liability provisions of five figures or four figures. Nothing that the insurer does or fails to do should permit a conflict of interests between the insurer and its own insured. The tenuous line demarking liability or non-liability for excess recoveries has been largely resolved to this premise: Has the insurer been properly zealous of the interests of the insured, or has the insurer neglected or overlooked the interests of the insured in an effort to conserve its own position? In other words, to avoid excess liability, the insurer must be prepared to establish that its primary concern, at all times from the moment of the original notification of the claim, was first and foremost to protect the insured, provided the insured has, on his part, obeyed all terms, covenants and conditions of the contract.

Before analyzing the prevention of liability in excess of policy limits, it might be well to consider what liability actually exists: The insurer has the right, an absolute right, to compromise or settle any claims against the insured. In so doing, the insurer is not required to prejudice its own interests. It has been held that the insurer acts as the insured's agent in effecting settlements. *Douglas v. United States Fidelity & Guaranty Co.*, 1924, 81 N. H. 371, 127 A. 708, 37 A.L.R. 1477. *Contra* it has also been held that in negotiating settlements, the relationship of principal and agent does not apply but rather that the insurer acts as an independent contractor. *Haluka v. Baker*, 1941, 66 Ohio App. 308, 34 N.E. (2nd) 68; *Foremost Dairies v. Campbell Coal Company*, 1938, 57 Ga. App. 500, 196 S.E. 279.

An insurer is not bound to "consult the interest of the insured to the prejudice of its own interests, in case of a conflict between the two; and the fact of protest by the insured is immaterial." *Long v. Union Indemnity Co.*, 1931, 277 Mass. 428, 178 N.E. 737, 79 A.L.R. 1116. While the insurer had the right to consider what it deemed to be in its own interest in making a settlement, it could not abuse the power vested in it, and recklessly and contumaciously refuse to settle, if it was apparent that, in all reasonable probability, its conduct would not only result in damage to the insured but also in loss to itself. *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 1916, 162 Wis. 39, 155 N.W. 1081. *Johnson v. Hardware Mutual Casualty Co.*, 1938, 109 Vt. 481, 1 A. (2nd) 817.

The insured need not consent to a settlement but he cannot prevent a settlement unless, of course, the settlement figure is in excess of policy limits. *New Amsterdam Casualty Co. v. East Tennessee Telephone Company*, 1905, C.C.A. Tenn., 139 F. 602, writ of certiorari denied, 26 S. Ct. 761, 201 U. S. 646, 50 L. Ed. 203.

Originally the courts held to the strict performance of insurance contracts and refused to extend, increase or enlarge liability. However, there have been many shades of distinction since the original doctrine of strict performance. In most jurisdictions, steadfast and consistent over the years has been the accepted premise that the mere refusal of an insurer to settle a claim within the policy limits does not *ipso facto* make it liable for an excess judgment. More recent decisions have exhibited a tendency to deviate from the original position and to enlarge the potentiality. The courts have quite properly recognized that hind-sight is better than fore-sight, inferring that there are many Monday morning quarterbacks, and that a mistake of judgment, honestly made, should not subject the insurer to additional liability. *Streat Coal Co. v. Frankfort General Insurance Co.*, 1923, 237 N. Y. 60, 142 N.E. 352; *Mendota Electric Co. v. New York Ind. Co.*, 1928, 175 Minn. 181, 221 N.W. 61; *Carthage Stone Co. v. Travelers' Ins. Co.*, 1918, 274 Mo. 537, 203 S.W. 822; *Boling v. New Amsterdam Co.*, 1935, 173 Okl. 160, 46 P. 2nd 916; *Johnson v. Hardware Mutual Casualty Co.*, 1936, 108 Vt. 269, 187 A. 788; *Lanferman v. Maryland Cas. Co. of Baltimore*, 1936, 222 Wis. 406, 267 N.W. 300; *Kingan & Co. v. Maryland Casualty Co.*, 1917, 65 Ind. App. 301, 115 N.E. 348; *Davis v. Maryland Casualty Co.*, 1931, 16 La. App. 253, 133 So. 769; *Georgia Casualty Co. v. Mann*, 1932, 242 Ky. 447, 46 S.W. 2nd 777; *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 1899, 92 Me. 574, 43 A. 503; *Long v. Union Indemnity Co.*, 1932, 277 Mass. 428, 178 N.E. 737, 79 A.L.R. 1116; *McDonald v. Royal Indemnity Ins. Co.*, 1932, 109 N.J.L. 308, 162 A. 620.

There has always been a pattern of uniformity in decisions throughout the coun-

try, where an insured has effected a settlement with a claimant, *dehors* the policy. Under such circumstances, the insurer is generally released from further obligation under the policy, and the insured is not entitled to any reimbursements whatsoever for moneys paid in settlement, or for the expenses incurred in effecting the settlement. *McCombs v. Fidelity & Casualty Co. of New York*, 1936, 231 Mo. App. 1206, 89 S.W. 2d 114; *Lanferman v. Maryland Casualty Co. of Baltimore*, 1936, 222 Wis. 406, 267 N.W. 300; *Maryland Casualty Co. v. Cook-O'Brien Const. Co.*, C.C.A. Mo. 1934, 69 F. 2d 462, certiorari denied, 55 S. Ct. 81, 293 U.S. 569, 79 L. Ed. 668; *Kesinger v. Commercial Standard Ins. Co.*, 1937, 101 Col. 109, 70 P. 2d 776; *U. S. Fidelity & Guar. Co. v. Cook*, 1939, 186 Miss. 840, 192 So. 24; *Raptis v. U. S. Fidelity & Guar. Co.*, 1931, 109 W. Va. 602, 156 S.E. 53; *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of N. Y.*, 1904, C. C. Mo. 130 F. 957.

While an insured may not with impunity effect a settlement within the policy limits, his consent to pay a sum in excess of policy limits, while not necessarily binding on the insurers, does not constitute a waiver of the policy provisions.

On the other hand, an insurer cannot impose terms outside of the scope of the policy as a condition precedent for a settlement. In other words, an insurer cannot demand that an insured make a contribution toward a settlement under the limits of the policy. If an insured refuses to settle in the policy limit, unless an insured makes a contribution, then an insurer may be liable for an excess recovery.

BAD FAITH RULE

An insurer may be liable for excess recoveries, if the insurer acted with bad faith toward the insured, or acted fraudulently. In the leading New York case of *Best Building Co. Inc. v. Employers Liability Assurance Corp.*, 1928, 247 N.Y. 451, 160 N.E. 911, 71 A.L.R. 1464, which has been followed in many jurisdictions, a unanimous bench affirming a judgment in favor of the insurer, wrote this enlightening *dicta*:

> "We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith. Even when there was little likelihood of recovery, many reasonable persons would think it wise to settle rather than to take any chance with a jury. In most of the cases, disputed questions of fact arise. Is the insurance company to determine at its peril whether reasonable-minded men would believe the plaintiff's witnesses in preference to its own? Again, even on conceded facts, as frequently happens, a serious question of law arises as to the nature or extent of liability, if any. Is a jury to say that the insurance company was guilty of negligence in choosing to try out such a question in the courts rather than to settle? These questions suggest the wisdom of adhering to the contract of insurance which the parties have made."

This case has been uniformly followed in many state jurisdictions and in certain federal courts. *Brown & McCabe Stevedores, Inc. v. London Guar. and Acc. Co.*, D.C. Or. 1915, 232 F. 298; *Levin v. New England Gas Co.*, 1917, 101 Misc. 402, 166 N.Y.S. 1055, affirmed 187 App. Div. 935, 174 N.Y.S. 910.

A mere error of judgment is not bad faith; nor is the failure to prejudge, within a degree of certainty, the outcome of a law suit. In *Georgia Casualty Co. v. Mann*, 1932, 242 Ky. 447, 46 S.W. 2nd 777, the Court said:

> "The gift of prophecy has never been bestowed on ordinary mortals and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case. The verdict represents the composite judgment of the assenting jurors and often times is but the resultant expression of conflicting views. Common experience teaches us that even where the injuries would justify a more substantial verdict, some of the jurors doubting whether there is any liability at all, are not willing to go that far, but insist on the verdict, as returned."

Failure to settle a case within policy limits, does not constitute bad faith; nor is the good faith of an insurer impugned because it believes that credence should be reposed in one set of witnesses rather than another. *Best Building Co. Inc. v. Employers' Liability Ass. Corp., supra; Auto Mutual Indemnity Co. v. Shaw*, 1939, 134 Fla. 815, 184 So. 852.

An insurer may not necessarily be charged with bad faith in disclaiming lia-

bility because of delayed notice or because of lack of cooperation on the part of the insured. One carrier was held justified in denying liability, where an insured failed to notify the company of change in his address, since such change would result in the payment of higher premiums. *Kleinschmit v. Farmers Mutual Hail Ins. Ass. of Iowa,* C.C.A. Neb. 1939, 101 F. 2nd 987.

Nor is it bad faith for a company to fail to notify an insured that a claim or case has not been settled, or that an offer has been made in settlement.

However, a company is required to notify an insured, if the claim or the demand is in excess of policy coverage, or if the company, as a result of its investigation, is of the opinion that a judgment might well exceed policy limits. *Hilker v. Western Auto Insurance Co. of Ft. Scott, Kan.,* 1931, 204 Wis. 1, 235 N.W. 413.

Bad faith has been termed as synonymous with fraud. The burden, of course, in proving fraud or bad faith rests on the one making the accusation. *Ohio Casualty Ins. Co. v. Gordon,* C.C.A. Okl. 1938, 95 F. 2nd 605. An insurer has no right to "gamble" and it is not a *bona fide* refusal to decline to settle because it does not make a practice of paying the full policy limits. This was held to be bad faith. *McCombs v. Fidelity & Casualty Co.,* 231 Mo. App. 1206, 89 S.W. 2nd 114. It was also held to be bad faith where the company had refused to settle within the policy limits, unless the insured made a contribution toward the settlement.

Fraud or bad faith has been rationalized as "intentional disregard of the financial interest of the plaintiff (insured) in the hope of keeping the full responsibility imposed upon it by its policy." *Johnson v. Hardware Mutual Casualty Co.,* 1938, 109 Vt. 481, 1 A. 2nd 817; *Noshey v. American Auto. Ins. Co.,* C.C.A. Tenn. 1934, 68 F. 2nd 808; *Berk v. Milwaukee Automobile Ins. Co.,* 245 Wis. 597, 15 N.W. 834; *Farm Bureau Mutual Auto Ins. Co. v. Violano,* C.C.A. 2, 1941, 123 F. 2nd 692; *McCombs v. Fidelity & Cas. Co. of New York,* 1936, 231 Mo. App. 1206, 89 S.W. 2nd 114.

In *City of Wakefield v. Globe Indemnity Co.,* 246 Mich. 645, 225 N.W. 643, one Frank Borski, who was injured, sued the City of Wakefield and obtained a judgment for $15,000, whereas the City of Wakefield only carried a policy to the extent of $10,000. In reversing a judgment in favor of the plaintiff, by a divided court, the majority opinion contained this reference to bad faith:

> "* * * It is not bad faith if counsel for the insurer refuse settlement under the bona fide belief that they might defeat the action, or, in any event, can probably keep the verdict within the policy limit, *Stowers Furniture Co. v. American Indemnity Co.* (Tex. Civ. App.) 295 S.W. 257; or have a 'fighting chance' to win, *New Orleans & Carrollton R. Co., v. Maryland Casualty Co.,* 114 La. 154, 38 So. 89, L.R.A. (N.S.) 562. A mistake of judgment is not bad faith. *Mendota Electric Co. v. New York Indemnity Co.,* 175 Minn. 181, 221 N.W. 61. On a prior review of the last case, reported in 169 Minn. 377, 211 N.W. 317, the Court said: 'Good faith and fair dealing are correlative obligations and the insurer owes to the insured some duties in the matter of the settlement of claims covered by the policy, *Brassil v. Maryland Cas. Co.,* 210 N.Y. 235, 104 N.E. 622, L.R.A. 1915A, 629, and where the insured *is clearly liable* and the insurer refuses to make a settlement, thus protecting the insured from a possible judgment for damages in excess of the amount of the insurance, the refusal must be made in good faith and *upon reasonable grounds for the belief that the amount required to effect a settlement is excessive.* We think this conclusion is in accord with the principles stated in the cases cited and that no injustice to the insurer will be done if they are adopted as guides to the courts.' * * * Where, to induce the insured to pay part of a settlement amount, the insurer represents to him that trial will result in a judgment which would cause him a greater loss than settlement, and, if he does not pay, the insurer will permit the action to proceed to judgment, the insurer acts in bad faith, *Brown & McCabe Stevedores, Inc. v. London Guarantee & Accident Co.* (D. C.) 232 F. 298.
>
> Undoubtedly the insurer does not act in bad faith, if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or, upon reasonable grounds, that the compromise amount is excessive, or if it has legal defenses, as yet undetermined by a court

of last resort, which, fairly seem applicable as the question of seasonable notice to the city of the claim of injury may have been in the instant case. There may be other bona fide reasons for refusal to compromise. On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith.

Good or bad faith is a state of mind. Of necessity it must be determined from proof of conduct, except as the owner of the mind discloses its operations. Defendants, being corporations, could act only through agents, whose state of mind is that of the defendants."

In the case of *Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kansas,* 1931, 204 Wis. 1, 235 N.W. 413, the Court stated:

"Terms which are not strictly compatible or synonymous have been used by different courts to indicate the same thing. Negligence has been used by some courts to mean the same thing that other courts have designated as bad faith. Bad faith, especially, is a term of variable significance and rather broad application. Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto. In order to understand what is meant by bad faith, a comprehension of one's duty is generally necessary, and we have concluded that we can best indicate the circumstances under which the insurer may become liable to the insured by failure to settle by giving with some particularity our conception of the duty which the written contract of insurance imposes upon the carrier.

"In express terms the contract imposes no duty at all, a breach of which makes the insurer liable to the insured for a failure to settle or compromise a claim. However, all courts are agreed that the insurer does owe to the insured some duty in this respect. This duty is implied as a correlative duty growing out of certain rights and privileges which the contract confers upon the insurer. By the terms of this contract the absolute control of the defense of such actions is turned over to the insurer, and the insured is excluded from any interference in any negotiations for settlement or legal procedure. It is generally understood that these are rights and privileges which it is necessary for the insurer to have in order to justify or enable it to assume the obligation which it does in the contract of insurance. So long as the recovery does not exceed the limits of the insurance, the question of whether the claim be compromised or settled, or the manner in which it shall be defended, is a matter of no concern to the insured. However, where an injury occurs for which a recovery may be had in a sum exceeding the amount of the insurance, the interest of the insured becomes one of concern to him. At this point a duty on the part of the insurer to the insured arises. It arises because the insured has bartered to the insurance company all of the rights possessed by him to enable him to discover the extent of the injury and to protect himself as best he can from the consequences of the injury. He has contracted with the insurer that it shall have the exclusive right to settle or compromise the claim, to conduct the defense, and that he will not interfere except at his own cost and expense. It is quite apparent that this right was given to the insurance company to induce it to enter into the contract of insurance, and that it is a necessary right to be possessed by it, if it is to write the insurance upon the terms stipulated. It is a right to be exercised by the insurer in its own interest.

"It is the right of the insurer to exercise its own judgment upon the question of whether the claim should be settled or contested. But because it has taken over this duty, and because the contract prohibits the insured from settling, or negotiating for a settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. If upon such consideration

it decides that its interest will be better promoted by contesting than by settling the claim, the insured must abide by whatever consequences flow from that decision. He has so agreed. But, as already stated, such decision should be an honest and intelligent one. It must be honest and intelligent if it be a good faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries as far as they reasonably can be ascertained.

"This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised. But we do not go so far as to say that, in order to characterize its judgment as one of good faith, it is necessary that it should absolutely exhaust all sources of information. We go only so far as to say that it should exercise reasonable diligence as the great majority of persons use in the same or similar circumstances. This is ordinary care. So it seems to us that the statement in the opinion, which is criticized, to the effect that a good-faith decision on the part of the insurance company upon the question of settlement must be preceded by the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims, states the duty devolving upon the insurer, just as we declare it to be."

RULE OF NEGLIGENCE

Imposition of liability for excess recoveries may also be imposed by what is recognized as the rule of negligence. Here we again find that most ephemeral, elusive, esoteric of all individuals, "the reasonably careful and prudent man." The standard applicable to the application of this rule is: What would the reasonably careful and prudent insurer have done under the circumstances? Did he exercise the same degree of care and diligence which a man of ordinary prudence would have exercised in the management of his own business? This is indeed a rigid standard and it is being more extensively recognized.

Where an insurer had an opportunity to settle a case for $1500. and delayed the settlement negotiations until such time as the demand was withdrawn, with the result that a verdict of $13,500. was obtained, it was considered a failure to exercise due care and the company was held liable. *Douglas v. United States Fidelity & Guar. Co.*, 1924, 81 N. H. 371, 127 A. 708.

Other cases which applied the negligence rule are: *Maryland Casualty Co. v. Elmira Coal Co.*, C.C.A. 8, 1934, 69 F. 2nd 616; *Cowan v. Travelers Insurance Co.*, C.C.A. 5, 1940, 114 F. 2nd 1015; *Ballard v. Ocean Accident and Guaranteee Co.*, C.C.A. Wis. 1936, 86 F. 2nd 449; *Noshey v. American Automobile Ins. Co.*, C.C.A. 6, 1934, 68 F. 2nd 808.

In the determination as to what constitutes negligence on the part of the insurer, it has been held to be a matter of law. *Auto Mutual Indemnity Co. v. Shaw*, 1939, 134 Fla. 815, 184 So. 852. It has been also held to be a question of fact for the determination of a jury. *Tyger River Pine Co. v. Maryland Casualty Co.*, 1933, 170 S. C. 286, 170 S. E. 346.

The juries may consider the manner of conducting investigations, the statements obtained by the carrier, correspondence between the insurer and its attorneys and investigators, settlement negotiations; in brief, the entire conduct of the investigation, preparation for trial, and the trial, including reports and recommendations, to determine whether or not negligence may be attributed to the insurer insofar as its conduct or misconduct may have affected the insured. *Brassil v. Maryland Casualty Co.*, 1914, 210 N. Y. 235, 104 N.E. 622; *Anderson v. Southern Surety Co.*, 1920, 107 Kan. 375, 191 P. 583, 21 L. R. 761. It is far easier, both on the law and the facts, to establish negligence on the part of an insurer than it is to establish bad faith or fraud. *Burnham v. Commercial Casualty Insurance Co. of Newark, N. J.*, 1941, 10 Wash. 2nd 624, 117 P. 2nd 644.

It is essential to bear in mind that an insurer may be held liable, not only for the amount of the excess, but for reasonable attorney's fees and other disbursements. *Maryland Casualty Co. v. Elmira Coal Co.*, C.C.A. 8, 1934, 69 F. 2nd 616; *Pacific Coast Cement Co. v. Metropolitan Casualty Ins. Co. of N. Y.*, 1933, 173 Wash-

ington 534, 23 P. 2nd 890; *Mendota Electric Co. v. N. Y. Indemnity Co.,* 1926, 169 Minn. 372, 211 N.W. 317; *National Battery Co. v. Standard Accident Ins. Co.,* 1931, 41 S.W. 2nd 599.

ANALYSIS OF RECENT DECISIONS

The trend for increased excess liability has been indeed pronounced. This has become manifest in divers jurisdictions.

Perhaps the most startlingly significant adjudication was made on December 22d, 1948, by the Court of Civil Appeals of Texas, (rehearings on petitions denied as late as December 30, 1948) in the case of *Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.,* 1948, 215 S.W. 2nd 904. Briefly the facts are as follows: On April 13, 1943, between 11 o'clock and midnight Riley Alexander was attempting to repair his automobile when a bus of the Lufkin-Beaumont Motor Coaches struck him and injured him severely. Alexander instituted action against the bus company to recover $65,000. damages. The bus company was insured in the Highway Insurance Underwriters to the extent of $5,000. During the course of the trial, settlement overtures were conducted between Alexander's attorney and the insurer's trial counsel. The case could have been compromised for $4500. This was rejected by the Claims Manager, acting upon the opinion of the defense lawyer, who thought they would either win the trial or bring recovery below the policy limits. The settlement offer of $4500. was repeated throughout the trial, but continuously rejected. There was no evidence that the insured ever demanded or requested that the insurer accept the offer of settlement. The verdict was in the sum of $11,000. with costs. Thereupon, the insured bus company brought action against the insurance carrier to recover the overage of $6,000. One special issue was submitted to the jury: "Do you find that a person of ordinary prudence in the exercise of such degree of care as such a person would use in the management of his own business, would, under the facts and circumstances known to the Highway Insurance Underwriters or to its attorney who represented the defendant, Lufkin-Beaumont Motor Coaches, Inc. in said suit, so brought by Riley Alexander against it, prior to the rendition of the jury's verdict in said case, have settled said case by paying said Riley Alexander the sum of $4500.?" It was answered in the affirmative. In affirming the judgment, the Appellate Court of Texas has apparently gone farther than any other authority in holding the insurer responsible for the entire judgment. Attention is directed to these highlights: The issue with respect to Riley Alexander's injuries was not disputed. Alexander had been -rendered unconscious, had broken bones in his pelvis and in both legs below the knees, and other flesh wounds. He was in the hospital five days and in bed at home for ninety days. Many pages of the court's opinion were devoted to the injuries, and the Court concluded that the "Insurer ought reasonably to have anticipated that the jury, trying the Alexander case would, in all probability, assess Alexander's damages at a sum substantially higher than the $5000. limit of insured's policy."

There were serious fundamental issues raised with respect to the liability, limited to two questions, viz: 1. Whether Alexander and his automobile were completely off the pavement, as he claimed, or were upon the pavement in the right-hand traffic lane in which insured's bus was lawfully proceeding, as insured said. 2. Whether the headlights and rear light or lights upon Alexander's automobile were burning brightly, as he said, or were not burning at all, as insured said. Alexander had as witnesses, besides himself, his brother-in-law and two others. Four other persons in Alexander's car were not produced as witnesses nor was their absence accounted for.

The evidence on behalf of the insured was adduced from five witnesses, the driver of the bus and four passengers. Each of the passengers corroborated the bus driver to the effect that Alexander was stopped on the pavement, without lights, and that he and his automobile were obscured from the bus driver's view by the lights of an approaching automobile. Some evidence was introduced to show that the people in Alexander's automobile had been drinking whiskey. The Court held (and affirmed its decision upon two rehearings) that the "Standard of conduct to be followed by insurer is due care. This is not the same standard of conduct as exists in those jurisdictions which profess to determine by insurer's good faith insurer's liability for rejecting offers of settlement. Good faith

apparently implies no more than an absence of an improper motive and some basis in reason for insurer's act. . . . which is much stricter than is the standard of good faith. . . . Good faith was but a circumstance relevant to the issue of negligence."

There is no contention that the insurer was influenced by any improper motives nor that the insurer conducted the defense of Alexander's action improperly or failed to properly prepare for trial.

"It seems to us that there is proof in these matters tending to show that the jury sitting on the trial of Alexander's case was more likely to find that insured was liable to Alexander than that insured was not, and thus, that a judgment against insured in excess of the policy limit was more likely than any other. Under these circumstances, would an ordinarily prudent person, in the position of insured, in the exercise of that care which he employed in the management of his own business, have accepted Alexander's offer to settle for $4500. rather than take the chance of being charged with a substantially larger verdict? We think the matter was for the jury."

One very interesting sidelight was raised in regard to the malpractice of attorneys retained by the insurer. Upon that, the Court declared: "It seems to us that a lawyer's good faith in representing his client does not necessarily determine whether he is liable in damages to a client who has suffered injury from his acts. (See 5 Tex. Jur. 468, et seq., Sections 60, 61 and 62). . . . However, whether the lawyers who defended insured and who advised insurer not to accept Alexander's offer of settlement were, or were not, liable to insured is not material." The obligation of the insurer, in that respect, was construed to be limited to the employment of competent lawyers to defend the insured.

Another milestone in the extension of the doctrine is *Dumas v. Hartford Accident and Indemnity Co.*, 1947, 94 N. H. 484, 56 A. Rep. 2nd 57 (re-hearing denied Jan. 6th, 1948).

That case followed an accident on July 22d, 1937, when one Ann Moran was struck by a car driven by Maurice H. Dumas, who had a liability policy in the Hartford Accident Indemnity Company to the extent of $5,000. The jury returned a verdict in favor of Miss Moran for $12,000. Dr. Dumas paid the excess and brought action against his carrier for recoupment, alleging that the claim of Miss Moran could have been, and should have been, settled for the original demand of $4,000. or the subsequent demand of $4,750. since Miss Moran's out-of-pocket expenses aggregated $2,971.50.

> "According to the old majority rule, the injured could recover the excess of a judgment above the policy limits from the insurer, because of its failure to effect a settlement for a similar sum, only if the company was guilty of actual fraud or bad faith. It should be noted, however, that this bad faith rule is tending to become the minority rule, being displaced by the rule of negligence. * * * (Appleman's Insurance Law & Practice.)

It is a well-recognized rule in the law of negligence that, when one has reason to anticipate that the person, property or rights of another are so situated as to him that they may be injured through his conduct, it becomes his duty so to govern his action as not negligently to injure the person, property or rights of that other. *Attleboro Mfg. Company v. Frankfort Marine, Accident & Plate Glass Ins. Company*, 1 Cir. 1917, 240 F. 573, 579.

Asserting that an insurer "cannot be too venturesome and speculate" with the trial of the issues in an accident case, at the risk of the insured, the Court declared that faced with such risk, the insurer should have been willing to purchase termination of Miss Moran's claim within the policy limit, adding that "the caution of the ordinary person of average prudence should be employed."

The fact that the insurer took into consideration the advice of counsel, was held to be insufficient excuse since "professional advice is merely one item to be considered and since the attorney selected was the agent of the insurer for whose conduct, while in its service and acting within the scope of his employment, the insurer was responsible. The mere fact that he was also an attorney at law did not excuse the defendant from responsibility in this respect."

The third leading case, illustrative of the current trend toward greater excess liability, is *Traders & General Ins. Co. v. Rudco Oil & Gas Co.*, C.C.A. 10, 1942, 129 F. 2nd 621. In that case one Carl H. Nelson, his wife and children, instituted ac-

tions against Rudco Oil & Gas Company in the aggregate sum of $63,000. alleging negligent operation of an oil and gas lease by Rudco, which caused a fire and explosion on October 14th, 1939, and resulted in bodily injuries and death to members of the Nelson family. Rudco was insured in the Traders & General Insurance Company, in a policy limited to $5,000. for one person and $10,000. for one accident. With full knowledge of the insurance company, but without their express consent, Rudco negotiated with the plaintiffs in the damage suits, and obtained an offer of settlement in the total sum of $17,000. conditioned upon immediate acceptance. These settlements were consummated but the insurance carrier refused to agree thereto, claiming that Rudco was free from negligence, that the amount requested in settlement was unreasonable and that the policy did not cover the loss. Rudco thereupon brought action, and the Circuit Court held that Rudco was entitled to reimbursement for the amount paid by him in settlement in excess of the limits of the policy. The Court observed that with an aggregate exposure of $63,000. Rudco had a great deal more at stake than the insurance company, and that Rudco had the right to demand, not a settlement on its own terms and conditions, but good faith and cooperation on the part of the insurer, wherein both parties would face the facts realistically and with mutual respect for the interests of each, adding the following, which indicates the ultimo of the present tendency:

". . . But, the rights of the insurer in these circumstances are not absolute, they are subject to moderation by the rule of right and justice. Exclusive authority to act does not necessarily mean the right to act arbitrarily. *Douglas v. United States Fidelity & Guaranty Co. supra.* The right to control the litigation in all of its aspects carries with it the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties. *Boling v. New Amsterdam Casualty Co., supra; Ohio Casualty Insurance Co. v. Gordon,* 10 Cir. 95 F. 2nd 605, 610; *Maryland Casualty Co. v. Cook-O'Brien Construction Co.,* 8 Cir. 69 F. 2nd, 462, 464; *Maryland Casualty Co. v. Elmira Coal Co.,* 8 Cir. 69 F. 2d 616, 618 and *Brassil v. Maryland Casualty Co., supra.* See Vol. 5 Couch on Insurance, Section 1165b. When the insurer undertakes the defense of the claim or suit, it acts as the agent of its assured in virtue of the contract of insurance between the parties, and when a conflict of interest arises between the insurer, as agent, and assured, as principal, the insurer's conduct will be subject to closer scrutiny than that of the ordinary agent, because of his adverse interest. *Douglas v. United States Fidelity & Guaranty Co. supra. Hilker v. Western Automobile Ins. Co.,* 204 Wis. 1, 231 N.W. 257, petition for rehearing granted and subsequently decided in 235 N.W. 413, and *G. A. Stowers Furniture Co. v. American Indemnity Co.,* Tex. Com. App. 15 S.W. 2d 544. . . . In all the cited cases, the announced rule has direct application to a state of facts wherein the assured refrains from interference in the litigation but awaits the final outcome before asserting its rights under the policy. We think, however, the rule applies with equal force to a prudent settlement, made by the assured in the face of a potential judgment far in excess of the limits of the policy. Why should the assured be required to wait until after the storm before seeking refuge?"

THE TREND IN LEGISLATION

Of even greater significance than the cases to which we have previously referred, have been the trends toward legislation with respect to excess recoveries. A bill was introduced in the Ohio Senate recently, (Bill 107-Sawicki) which provided in effect that in the event an offer of settlement for an amount equal to, or less than the face value of a policy was rejected, without the consent or approval of the insured, the judgment-creditor may recover the amount of the judgment over and above the value of the policy, and if the judgment-creditor failed to proceed against the insured for the excess, the insured may bring an action to recover the excess. Strenuous objections were raised to the bill, but it passed the Ohio Senate by a vote of 20 to 10, and according to my last information, the bill was referred to the House Judiciary Committee. If such bill shall become law in Ohio, similar action may be taken elsewhere, and the result will be much higher premium rates.

PREVENTION

Philosophers from time immemorial have been warning us about excesses. We all well know that the aftermath of any excess may bring headache, hang-over, grief and sorrow.

Accordingly, in this adumbration, with respect to the ounce of prevention which should be imposed, it is noted that an insurer must go far beyond the strict limitation of the policy, and anticipate that decisions and statutory provisions will become more and more extensive and inclusive. One cannot find figs on thistles. It is no longer sufficient for the insurer to act merely in good faith. It will no longer suffice for the insurer to act without fraud. The conduct of the insurer is subject to much closer scrutiny. The actions of the insurer must be judged in light of reasonableness and prudence under existing circumstances.

Of necessity the insurer must act diligently upon all claims. Thorough and timely investigations are a prerequisite. Competent counsel must be engaged. The opinions of counsel must always be carefully considered, if not always followed. The investigations must not only be completed with dispatch, but they must be revived; and as time passes, contact must be maintained with important witnesses. Where injuries may have grave or permanent sequalae, it is well to explore the precedent, as well as the antecedent circumstances, i. e. to go into the background of the claimant, and to keep him under vigilant observation by medical examiners or investigators, to ascertain both the origin of the condition and the extent of his recovery.

Blunders on the part of the insurer, while heretofore frequently excused, may not be henceforth overlooked. One company some few years ago, was exonerated from liability because the settlement negotiations were with a parent who had not been duly appointed tutrix of an injured infant. Such immunity may no longer exist. In accordance with current decisions, extreme care and caution should be observed to respect periods of limitation, authority, or lack of it, where one sues or is sued in a representative capacity, and to interplead additional defendants in those jurisdictions where "actions over" are permitted.

All of these, and many more considerations may be adduced, with the thought in mind that in the event of excess recovery, the entire file, the recommendations and reports, may be perused by court and jury in an action where the insurer may be sued by its own insured or his judgment-creditor.

Of even greater importance than the necessity of efficient investigations and competent legal talent, is the emphasis apparently placed upon the efficacy of settlement. There are, as we all know, some insurance companies whose policies are to settle a majority of claims presented against them. Other companies litigate claims to greater extent. In practically every case where excess recovery was allowed, a settlement of the original claim might have been effected, at some time before judgment, within the limits of the policy. Whether in the courtroom, in the field or in the home office, those charged with the decision as to whether a settlement should be concluded must be more definitive; and the decision never should be reached arbitrarily or diffidently. This does not mean that settlements are invariably indicated, nor does it mean that verdicts will not exceed figures discussed in settlement. It does mean, however, that in the exercise of due care and prudence, the insurer should exhaust the proper possibilities of settlement before leaving the issues to the intangibles of litigation.

It is to be hoped that in reaching the desired solution, there be more cooperation between excess and primary carriers, in their mutual interest.

A man who lived on the seacoast, invited a distant relative, who had always resided in the back country, for a visit. Finally the relative arrived. In his entire life he had never seen the ocean; so, as one of the high spots of his trip, he was taken to a prominence overlooking the tremendous expanse of water. After gazing at the ocean for some time, the visitor from the hills exclaimed: "It is magnificent. It is marvelous. Never in my life have I seen anything like it. With water before me as far as the horizon in every direction, I am almost speechless." The host, wishing further to impress the grandeur of the panorama, replied: "It is wonderful. And, don't forget, you are only seeing the top of it!"

With respect to the potentiality when excess judgments are obtained, there are

many who would like some assurance that the contract, like the ocean, has topside limits.

MODERATOR WHITFIELD: Thank you very much, Mr. Dempsey, for your very able presentation of this most important subject.

It seems to me that as a preliminary to the questions which we are going to invite from the floor, it might be appropriate to comment that if I understand your summary of the trend of the decisions, the plaintiffs' lawyers today in the insurance field have no problems, the policy limits mean nothing, and the problem is from the standpoint of the defense lawyer and the insurance company: What are their legal possibilities of having a top limit established on their liability?

Now, I think in order to narrow down the discussion it might be appropriate to summarize in this way one or two conclusions: The first is that there is, I believe, little disagreement at the bar or among insurance companies that in the case of fraud on the part of the insured's company, the insurance carrier, that liability in excess of the policy limits might possibly be justified. The real issue arises in the case where the company has been proceeding in what it considers the proper exercise of due care, and the question is, under those circumstances, what is the nature of the policy liabilities of the company?

MODERATOR WHITFIELD: Now, gentlemen, we are ready to proceed with the questions, and I will recognize you in what I will try to make the best order of priority to get the discussion started. The floor is open for discussion. The gentleman back there, please.

MR. JAMES W. MEHAFFY (Beaumont, Texas): I would like to get Mr. Dempsey's idea in this Texas case as to the liability of the lawyer. The trial counsel in that Texas case is sitting over on my left. The court did dodge that question in that case, but on the basis of the proposition that the liability of the principal is based upon *respondeat superior,* and in that case the company relied upon the recommendation of the trial counsel. Why wouldn't the trial counsel be liable himself?

MODERATOR WHITFIELD: Mr. Dempsey, there is a poser for you.

MR. DEMPSEY: As I understand, that was the contention that was raised upon the second rehearing. When that came up for the third time before the Texas court they said, "Here, this is going to have lawyers liable with almost unlimited exposure and potentiality," but the court held, as I understand it, that the attorney was employed by the company; while the company had a right to listen to the attorney, that didn't affect the situation here.

I think, myself, that if that is good law, all attorneys, and judges particularly, in Texas particularly and perhaps in other states, might have a great deal of exposure themselves for deciding whether a case should go to a jury or whether a case should be settled, and that was the thing that concerned Tiny Gooch more than anything else in the article in the Journal a few months ago, looking at it not so much from the aspect of the company as from the aspect of the attorney. I hope that they don't extend that to all jurisdictions, because it will certainly be very serious to all attorneys.

MR. MEHAFFY: I think we ought to have malpractice insurance.

MR. DEMPSEY: I think so, yes.

MR. JOHN L. BARTON (Omaha, Neb.): Who raised this question?

MR. DEMPSEY: That question was raised, as I understand it, by the insurance company themselves, when they came up on a second rehearing. The insurer said, "We relied upon the statement of competent counsel, and if you hold us liable, you hold the lawyer liable in malpractice, and you shouldn't do either," they inferred, and the court didn't decide whether the lawyer was guilty of malpractice but held the company guilty.

MR. MATTHEW J. O'BRIEN (Chicago, Ill.): I would like to ask Mr. Dempsey if the reservation of a right agreement, or a similar agreement, between the assured and the company would be overruled or carried out in such a situation. Suppose they got together and said, "Well, there is a chance here, but we are going to take a chance and go through with it?"

MODERATOR WHITFIELD: In other words, am I understanding your question correctly that you are raising the issue if the assured contracts with the insurance

company to go ahead and have it tried out, would that be sustained by the courts later?

MR. BARTON: That is right.

MR. DEMPSEY: Well, of course, that would depend as to whether the assured agreed or consented to the waiver or not. In most of these cases you find that the waiver, the reservation, is imposed by the company but is not consented to or acquiesced in by the insured. If he consents to it, then, of course, he cannot later come in and complain.

MR. JOHN WINKLER (Columbus, Ohio): Let's assume that an accident results in multiple claims, small limits, and the total of the claims admittedly are in excess of the policy limits. Is an insured or the carrier safe in settling one of the claims or a number of the small claims and taking a chance on the trial as to claims that they cannot settle?

MODERATOR WHITFIELD: If I can correctly paraphrase Mr. Winkler's question, he suggests this kind of hypothetical case: Where you have a series of claims arising out of one accident and where there are questions of liability is the insurance carrier safe in settling some of the small claims and proceeding to trial on the larger claims even though the aggregate may run over the policy limits? Am I correct, sir?

MR. WINKLER: That is correct.

MR. DEMPSEY: There is a case right in point on that, holding the insurance company is not liable where they have settled some claims and have litigated others. That does not mean that they are exhibiting either bad faith or negligence.

MR. JAMES A. ANDERSON (Shelby, Ohio): You spoke, Mr. Dempsey, of cooperation between primary carriers and excess carriers. I wondered if you were referring to that Wisconsin case. I just wondered what your point was there.

MR. DEMPSEY: Well, my point is this: I think usually the excess carrier is the one who has the burden here for any of these excess recoveries. However, there has been a suggestion, as I understand, that perhaps the excess carrier may on occasion have cooperated with an insured, and one of the things that I think is of importance to such a gathering as this is complete cooperation between the excess carrier and the primary carrier in their own interests.

MODERATOR WHITFIELD: In other words, if I understand Mr. Dempsey's question, he is raising the issue as to whether the company having an excess treaty with a primary carrier might also be involved as an excess carrier for the liability beyond the limits of its treaty with the primary carrier; is that correct?

MR. DEMPSEY: That is correct.

MODERATOR WHITFIELD: So far as I know, there are no direct cases on that point. That is correct, isn't it?

MR. DEMPSEY: That is correct.

MODERATOR WHITFIELD: I might add that one of the clients that we represent, in trying to deal with this question of liability in excess of the policy limits recently, made a request to its reinsurance carrier for a specific provision or a specific contract with its excess carrier by which the reinsurance carrier would assume the liability of the primary company for liability in excess of the policy limits, and I am advised by the company officials that the reinsurance company involved stated that there was no precedent for such a policy. I believe that our client has made request for such coverage to Lloyds of London, but I believe that they have been unable as yet to determine either that Lloyds would consider writing such a treaty or that they would establish any basis for the premium under such circumstances.

Are there any other questions?

MR. STANLEY M. BURNS (Dover, N. H.): Mr. Dempsey, sometimes, as you probably know, you are defending an assured and he doesn't think that he is liable, that he should pay anything. I have established the practice sometimes of asking the assured, "Do you think you are liable in this case?" And he says, "No." "Well, supposing you have to pay the verdict out of your own pocket if you are not insured. Do you think we should accept the offer?" He says, "No." Do you think it would be advisable to have him sign a stipulation to the effect that he doesn't think he is liable; that he doesn't think the offer which they have made is fair and should be rejected?

MODERATOR WHITFIELD: Shall I restate the question for the gentlemen in the back here? The question is that an assured is convinced in his own mind that he is not liable and that the company should pay nothing, or an amount which is less than the policy limits. The question to Mr. Dempsey is, is it good practice to get a stipulation or statement from the assured to that effect?

MR. DEMPSEY: The decision, of course, as to whether a case will be settled or tried is entirely up to the company, up to the insurer. If there is any possibility of any future comeback by an insured, it might be well to have some written authorization saying, "Yes, I would like to have the case litigated." And you frequently find that there are cases where an insured would prefer not to have a settlement and wants to have a case tried. I think if you can get it in writing, it would be helpful.

MODERATOR WHITFIELD: May I, before I ask for another question here, comment on the subject of this paper by summarizing again the conclusions that Mr. Dempsey has reached and then giving you some comments that have arisen in our practice?

Mr. Dempsey has suggested that there are various ways of eliminating liability in excess of the policy limits; for instance, having the agents sell higher policy limits, the possibility that the excess reinsurance company may have some responsibilities, and the suggestion that more efficient lawyers be hired, and in that latter connection we have been discussing in our office, in connection with one of our clients, the question that if there is an obligation on the insurance company to use due care in settling the liability in excess of the policy limits, perhaps there is also a liability which exists under the general principles of law upon the assured to mitigate his damages in excess of the policy limits.

The illustration which we have in mind is about like this: Let us suppose that the policy limits are $10,000. There is a disputed question of liability. The damage suit is for $30,000. There is an offer of settlement of $9,000, and the primary insurance carrier has determined that it wants to litigate it. Then it is obvious, if there is an offer of $9,000, that usually you can buy a release for the liability in excess of the $10,000 policy limits for a nominal sum of money. Now, is there some procedure by which the insurance carrier can insist that the assured make a nominal payment of $500 or $1,000 and eliminate the excess policy liability?

Now, Mr. Sprinkle may be in the audience—I am not certain whether he is or not—but his office in Kansas City, working with one of our companies, has been involved in this specific problem, and we have developed a series of forms which we are using in this type of situation which, in substance, are used like this: When demand is made on our insurance carrier to pay the liability because it is within the policy limits, then we make a demand on the insured to mitigate his damages by buying a release for the liability in excess of the policy limits. That demand on the insured is very carefully worked out. While it has not been litigated in a court of last resort, we believe that there is a basis for making that stick, and we have some authority which might be of interest to the profession.

The case that we have in mind is the *General Accident, Fire & Life Insurance Corporation vs. The Louisville Home Telephone Company,* decided in the Court of Appeals in Kentucky, 193 S.W. 1031. In this case the assured carried a $5,000 liability policy to protect him against negligence to third parties. A chap named Beals received injuries for which he sued and the trial resulted in a verdict for $12,000, but a new trial was granted and on the second trial the plaintiff received a judgment for $7,250. Both the plaintiff and the defendant appealed from the results of the second trial, the plaintiff contending on his cross-appeal that the $12,000 judgment rendered in the original trial should be reinstated.

Before the decision on the second appeal, the Telephone Company, without the knowledge of the insurance company, paid $2,250 and interest, which was the amount above their coverage, to the plaintiff. The case was affirmed for $7,250 and the insurance company refused to pay their $5,000 and the Telephone Company sued them. The insurance company's defense was that the assured should not voluntarily settle or interfere without the consent of the company.

The question was, could the Telephone Company settle without the consent of the insurance company for that portion of the

judgment against which it was not indemnified without violating its policy? The Telephone Company conceded that it could not settle any claim within its coverage, but argued that had the second judgment been $10,000 and it could have settled its excess for $1,000, they had a right to protect themselves. The Appellate Court held with the Telephone Company that they could make such a settlement and that by so doing it did not deprive the insurance company of its right to contest in its own way its liability for the sum it was obligated to pay under the contract.

Now, I throw that out for discussion and consideration by some of you and will proceed with the questions. Questions, gentlemen?

MR. GOBLE DEAN (Miami, Fla.): Is it necessary for the carrier to advise the assured of an offer of settlement below the policy limits and for the assured to make a demand of payment upon the insurance carrier in order to attach the excess liability to the carrier?

MR. DEMPSEY: As I understand, it is not. If the demand is under the policy limits, there is no obligation on the part of the insurer to notify the insured, unless they feel that it is a case which might well go over.

MR. DEAN: Well, what I was wondering in that situation was, if the insurance carrier wouldn't be exercising bad faith in failing to notify the assured of the offer and then in dealing with the assured's money and gambling upon a verdict.

MR. DEMPSEY: Well, they have specifically held—and I don't think the new cases have changed that line of cases—that it is not necessary to notify an insured if it is under the policy limits.

MR. W. L. KEMPER (Houston, Texas): A number of authorities are cited for the proposition that the assured can himself settle his excess liability. Now, more or less the converse of Mr. Whitfield's proposition, can the insurer settle with the third party for the full amount of his policy and surrender its defense to the assured? The New Hampshire court has held in one case that it could not do it on the eve of trial but clearly implied that it could be done.

There are a number of other cases touching on that question. I was wondering whether your investigation had extended into that question. Under the present standard policy, the policy provides that the defense is extended only as respects such insurance as is covered under this policy. Some of the authorities are tending to hold now that where you pay the full amount of your liability to the third party, you don't owe also the defense. There are two Michigan cases that are very interesting on that question, particularly for the reason that the other view that you couldn't do it originated in the old *Poultry Company* case from Michigan, in which that court, following the case in 43 2nd, has held it is bad law in view of the terms of the new policy.

I wondered whether your investigation had extended into the possibility of the insurer making a settlement with the third party for the full amount of its liability and surrendering its defense to its assured.

MR. DEMPSEY: I don't have a case in mind.

MR. KEMPER: There are some cases. There is a multiple claim case in about 160 or 161 Fed. 2d, where a hotel was sued in the instance of a fire, and they did tender to the assured in that case the full $10,000 limit of their policy and refused to defend, and the Federal Circuit Court held in that case they did not have to defend the other cases.

MR. DEMPSEY: I think an insurer might do that at its peril because under most standard policies the provision is that they must defend and pay up to a certain amount. In paying up to that amount they only discharge part of the contract.

MR. MAURICE F. DEVINE (Manchester, N. H.): Was that case that you cited in New Hampshire the Lumbermen's Mutual?

MR. KEMPER: I don't recall.

MR. DEVINE: Those cases were in our office, if I may be allowed to clarify that end of it, and we always felt—my colleague, Stanley Burns, sitting next to me, and myself—that we always, even if we pay the policy limit, afford a free defense just the same. We are afraid not to.

MODERATOR WHITFIELD: Thank you, sir.

MR. JOHN H. ANDERSON, JR. (Raleigh, N. C.): I would like to ask to what extent is payment of the excess amount by

the assured required by the courts before a cause of action would arise against the company for the excess, and then there is another question connected with that: Then to what extent can we be influenced in our thinking by the financial condition of the assured?

MODERATOR WHITFIELD: Those two questions are very good ones, Mr. Dempsey.

MR. DEMPSEY: I don't think payment is necessary. I think that the judgment creditor of the insured may bring the action, as well as the insured.

MR. JOHN H. ANDERSON, JR.: That raises a point. Mr. Long, from Atlanta, just mentioned something to me. I think he has a very interesting case right on that point that he is involved in now.

MR. STANLEY B. LONG: The case has already been decided. The point raised in that case was whether or not a plaintiff could require the company to settle within the policy limits. So far as I know, it is the only case on that question in this country. The Georgia court held that a plaintiff, not being a party to the contract, could not take that position.

MODERATOR WHITFIELD: Thank you, sir.

Any other questions?

MR. SAMUEL LEVIN (Chicago, Ill.): We had an interesting case in Illinois just a few years ago which will offer a suggestion for the mechanics for the protection of the lawyer and the company in the manual operation of this protection. In that case the Appellate Court of Illinois sustained excess liability to this casualty carrier on the ground of bad faith. In that case there was an offer of settlement before verdict which was declined. On appeal there was another offer of settlement by the plaintiff, still under the limits, and in that particular case the court pointed out that the attorney for the insurance carrier representing the defendant, after the case had gone to appeal, in his opinion to the claim department as a reason for not paying, merely suggested technical defenses, procedural defenses, as the ground why the claim should not be paid, and the effect of the decision was that the opinion to the claim department or the insurance carrier should consist of something more than merely technical defenses or procedural defenses in the case and should be a matter of substance.

MODERATOR WHITFIELD: May I summarize your comment, sir, by saying I think you are pointing out to the members of the bar that in the future our reports to the home offices of companies must be carefully prepared and, perhaps, constitute what we would recognize as self-serving declarations. Well, if any group can write the record to protect us on that point, I guess lawyers can do it, although it will take us some time.

MR. LESLIE H. VOGEL (Chicago, Ill.): I am in doubt as to where lies the cause of action in such a situation as was put by Mr. Anderson. It seems, as I understood Mr. Dempsey, the cause of action may well rest in the injured plaintiff or judgment creditor. Do I understand Mr. Dempsey's comment correctly?

MR. DEMPSEY: Yes; I believe that the judgment creditor has the action. I think there is a difference between the judgment creditor and the claimant. Once the judgment has been obtained, that has deprived the insured of having an otherwise, shall I say, unblemished credit record, and I believe it is not necessary for the insured to pay the judgment in order to have a liability for excess exposure.

MR. BURNS: Assume that the original damage was $5,000, which was within the limits of coverage, and then on the morning of trial counsel for the plaintiff moves to increase it to $10,000 and the court grants it, and you move for a continuance and the continuance is denied and you are to go to trial at once. What is the proper protection that you can give the company under those circumstances?

MODERATOR WHITFIELD: Well, I would say that you would have to do a lot of fast footwork, and I am going to let Mr. Dempsey tell you what to do.

MR. DEMPSEY: Well, I don't know. I think we might have, as one has suggested, the heart attack which caused a delay in this other case out in Kansas. Now, it seems to me that all you can do there is to protect yourself on the record. That has been often done. Settlement negotiations and discussions have been had in chambers, not, of course, within the hearing of the

jurors, just for that purpose, to have a record which might protect the insurer and its counsel.

MR. THOMAS N. PHELAN (Toronto, Canada): I apologize for taking any of the time of your meeting because our problems are only to a limited extent yours, but we have in Ontario a procedure that might be of interest to you as providing a possible solution for this difficulty. Am I right in assuming that you have in most of your jurisdictions the ordinary third party procedure, quite apart from insurance law or practice, whereby you can add a third party for indemnity or contribution or some similar relief?

MODERATOR WHITFIELD: Well, the answer is "Yes" and "No," I think, under certain cimcumstances, and I am not sure I can answer directly.

MR. PHELAN: In Ontario we have passed a very simple amendment to the Insurance Act whereby an insurance company might apply to be added as a third party. When that order is made, the defense of the action immediately passes back to the insured and the insurer has all the rights to plead, to intervene, to examine witnesses, and to protect its interests.

Now, I do not know whether that would be of assistance to you or not, but we have found it very useful in Ontario in meeting a situation such as you have been discussing this morning.

MODERATOR WHITFIELD: Do I understand your procedure then puts the insurance carrier in a position that, in substance, might be adversary to the assured defendant; is that right?

MR. PHELAN: Yes, sir; and he passes the defense of the action back to the insured.

MODERATOR WHITFIELD: And that is based upon a statutory provision that you have in your Insurance Code?

MR. PHELAN: We have it in our Insurance Code. It was a very innocent amendment when it was passed. It has some difficulties and drawbacks, but we have found it very useful in many cases.

MODERATOR WHITFIELD: Thank you, sir, very much.

Are there any other questions, gentlemen?

MR. MATTHEW J. O'BRIEN (Chicago, Ill.): As I understand it, the assured need not be told about the amount offered in settlement?

MODERATOR WHITFIELD: Mr. Dempsey.

MR. DEMPSEY: The assured should be advised whenever the demand is in excess of policy limits, and the assured should also be advised whenever the company, in its judgment, feels that there may be a verdict over the policy limits. Now, of course, the assured knows that the amount in the pleadings is invariably over the limits of a small policy. In other words, they must advise the assured of either excess demand or excess potentiality.

MR. O'BRIEN: The question I had in mind was this: In Illinois you have to do certain things—the assured has to—in order to claim an excess recovery. Suppose you keep quiet on it; the assured doesn't say anything, or the company doesn't say anything, and you wake up with a nice excess verdict. Have you found anything that would cover that situation?

MR. DEMPSEY: I haven't, but I will say this much: I think the different states have different rules, of course. I don't know what your Illinois rule is specifically. I think the whole thing can be well summarized: If you are ever zealous to be exceedingly fair and considerate of the interests of the insured, then the chances of charging either negligence or bad faith would be rather remote.

MODERATOR WHITFIELD: Any other questions, gentlemen?

MR. S. BURNS WESTON (Cleveland, Ohio): With the risk of over-simplification, I wonder if this is a fair deduction regarding this question in very general terms: Is it fair to say that where there is a very questionable case of liability on the facts themselves, that the problem of excess verdicts is not as serious when it comes under suit by the insured against the insurer; that where there is a clear question, or at least what appears to be a clear question, of liability, and leaving only the question of damages, that it becomes a more serious problem, and if I am correct to that point, to what extent have you found assistance from the courts on the question of judg-

ment as to the value of damages in absolving the insured or the insurer?

MR. DEMPSEY: Well, to this extent: The courts have held time and time again that nobody charged with the responsibility of an insurer could ever predict what a jury will do. After all, you have certain standards. You men, all of whom are in insurance in one phase or another, know a broken arm or a broken leg or the loss of an eye has certain average limits. Nobody can tell what the jury will do, and you are not expected to do that. I haven't found a distinction there between liability of an insurer where there is only a question of assessment of damages, and I must say that I think this Texas case is the exception rather than the rule. I feel that way about your New Hampshire case, but it may be indicative of a trend in the other states.

MODERATOR WHITFIELD: Gentlemen, unless there are some other questions, I want to summarize the discussions this morning in this way for you:

A year ago at San Francisco this section of the International Association of Insurance Counsel discussed the provisions and the legal decisions under the omnibus clause in the policy. This morning we have discussed the cooperation clause as a condition precedent to liability, and also we have discussed the question of liability in excess of the policy limits.

I want to point out to you that we are discussing in each one of these questions a problem which arises out of the language of the policies and extensions or modifications of the language of the policies which are arising out of court decision and interpretation. A year ago at San Francisco the comment was made that in due course the interpretation of the policies as developed by the courts should probably become reflected in the language of the policies in order to minimize litigation, if that is possible, in the interests of serving the general public.

Now, gentlemen, it has been a great privilege to preside at this morning's session. I want to ask you to give a real round of applause for Frank O'Kelley and James Dempsey for the very fine work they have done.

. . . The audience rose and applauded . . .

MODERATOR WHITFIELD: Thank you, gentlemen, and the meeting is adjourned to the golf course and other points of interest.

Report of the Casualty Committee

THIS Committee undertook for its 1949 report an analysis, nationwide in scope, of the "Wrongful Death Action" and the "Survival Action." The report herewith submitted embraces statutory and case law on the subject in all the 48 states.

This report covers such problems as (1) Who may or who must bring the action; (2) The statutory period in which such action can be commenced; (3) The statutory limitation on the amount of recovery; (4) The right if any to recover

a. Funeral expenses
b. Hospital and medical expenses
c. Property damage;

(5) The right to recover for "loss of services," "companionship," and "pain and suffering"; (6) Whether the action abates on the death of the "wrongdoer" either because of statutory or constitutional provisions.

The Committee regards this report as of great value to Home Office Claim Managers, because a quick glance at the report for any particular state will immediately reveal the answer to nearly every question contained in the preceding paragraph.

The task of preparing this nationwide report has been an enormous one but nevertheless very interesting.

The Committee is deeply indebted to the following lawyers not members of the Casualty Committee for their untiring efforts in making this report possible:

Sam R. Baker, Alabama.
Thomas G. McKesson, Arizona.
John P. Faude, Connecticut.
William Bennethum, Delaware.
Parker Holt, Florida.
James K. Rankin, Georgia.
R. P. Parry, Idaho.
John Easterberg, Illinois.
George M. Brewster, Kansas.
Harold Tschudi, Maryland.
Timothy A. Hughrue, Massachusetts.
Eugene M. Clennon, Massachusetts.
F. E. Richardson, Maine.
Junior O'Mara, Mississippi.

W. J. Jameson, Montana.
J. K. Dorsett, North Carolina.
Louis E. Wyman, New Hampshire.
Francis Van Orman, New Jersey.
Waldo Rogers, New Mexico.
Mart Brown, Oklahoma.
Borden Wood, Oregon.
F. V. Reynolds, Rhode Island.
B. Alston Moore, South Carolina.
Harvey White, Virginia.
William H. Edmunds, Vermont.
Geo. Kahin, Washington.

Others also assisted whose names we do not have and to them we express our thanks.

Your Chairman greatly appreciates the fine response and excellent work of the Committee Members in making this report possible.

In assembling and re-editing this report your Chairman was ably assisted by Mr. John Buford, Law Student at Creighton University of Omaha.

Joseph B. Beach
Palmer Benson
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ALABAMA

I. (A) Statutory provision

"A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." Title 7, Sec. 123, Code of Alabama, 1940.

(B) Construction and interpretation

Under this statute the damages are entirely punitive. No elements of compensatory damages are allowed. *Faulkner v. Gilchrist,* 143 So. 803; *Citizens Light, Heat & Power Co. v. Lee,* 62 So. 199; *Randall v. Birmingham Ry. Light & Power Co.,* 53 So. 918.

II. Right of action in the case of wrongful death of adults is in personal representative. Title 7, Sec. 123, Code of Alabama, 1940, supra.

III. Because of the punitive nature of the statute, the personal representative cannot recover for loss of support to next of kin or for damages to decedent's estate (such as property damage, medical, hospital and funeral expenses—even if the latter are paid by wife, husband or parent). *Kern v. Counts,* 22 So. (2d) 725; *L. & N. R. R. v. Tegner,* 28 So. 510. However, it is to be noted that an "action" on which suit had already been brought by the deceased before death, as for damages to the automobile, would survive under Title 7, Sec. 150, Code of Alabama, 1940, but not a cause of action.

Pain and suffering is not an element of damage. See I (B), supra.

The personal representative cannot include in his action value of services of a wife to surviving husband, or vice versa, because the damages are punitive only. See I (B), supra.

IV. Wrongful death of minor

Statute: Title 7, Sec. 119, Code of Alabama, 1940.

The right of action is first in the father, and then in the mother, and only in the

administrator if the parents are disqualified or fail to bring the action for six months. Title 7, Sec. 119, Code of Alabama, 1940; *Peoples v. Seamon,* 31 So. (2d) 88.

The personal representative has no authority to recover value of services of deceased child to his parent or parents, because the measure of damages for causing wrongful death of deceased child is punitive also, and differs in no respect from Sec. 123, *supra. L. & N. R. R. v. Bogue,* 58 So. 392; *McWhorter Transfer Co. v. Peek,* 167 So. 291.

V. Statute of limitations is two years after death. Title 7, Sec. 123, Code of Alabama, 1940, supra.

VI. There is no statutory limitation of amount recoverable.

VII. The "action" (suit having been filed before the death of the wrongdoer) does not abate, but may be revived against his personal representative. Title 7, Sec. 123, Code of Alabama, 1940, supra. However, the cause of action does so abate so that the suit may not be brought in the first instance against the tort feasor's personal representative. *Webb v. French,* 152 So. 215; *Wynn v. Tallapoosa Bank,* 53 So. 228.

ARIZONA

I. (A) Statutory provision

"Whenever the death of any person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter." Arizona Code Annotated, 1939, Sec. 31-101.

(B) Construction and interpretation

See *De Amado v. Friedman,* 89 P. 588; *Southern Pac. Co. v. Wilson,* 85 P. 401; *Arizona Binghampton Copper Co. v. Dickson,* 195 P. 538, 44 A. L. R. 881.

II. Right of action in the case of wrongful death of adult is in personal representative. A.C.A., 1939, Sec. 31-101, supra.

III. Under the statute providing for recovery for death by wrongful act, the damages recoverable are damages to the estate and not to the beneficiaries. The action is one for damages to the estate, and the only damages held recoverable are a sum to be determined by the jury to be the probable accumulations of the decedent had he or she lived to his or her allotted time under or according to the mortality tables. *De Amado v. Friedman, supra; Keefe v. Jacobo,* 54 P. (2d) 270.

There is no provision for recovery of loss of services to the surviving spouse; the action being for the benefit of the estate of the decedent and not particular beneficiaries. In re *Lister's Estate,* 195 P. 1113; *Womack v. Preach,* 165 P. (2d) 657.

The personal representative has no authority to recover for "loss of companionship.' *Keefe v. Jacobo, supra.*

IV. Wrongful death of minor

Statute: No special statutory provision.

In the case of death of a minor the right of action is in the father, or in the case of his death or desertion from the family, the mother. A.C.A., 1939, Sec. 31-102.

The statutes providing for wrongful death do not provide for the value of services of a deceased child as such, but in the event the death involved is that of a child, the damages recoverable are the probable accumulations of the child had he or she lived his or her allotted time according to the mortality tables. See cases cited under I (B) supra.

V. Statute of limitations is two years from death. A.C.A., 1939, Sec. 29-202.

VI. The amount recoverable for wrongful death is not limited by statute. A.C.A., 1939, Sec. 31-103.

VII. An action for wrongful death does not abate by reason of the death of the defendant. It has been held, however, that the action must be instituted prior to the death of the tort feasor or the cause of action does not survive. A.C.A., 1939, Sec. 21-534; *McClure v. Johnson,* 69 P. (2d) 573.

ARKANSAS

I. (A) Statutory provision

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or cor-

poration which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." Arkansas Statutes Annotated, 1943, Vol. 3, Sec. 27-903.

(B) Construction and interpretation

The above quoted statute is repealed by Sec. 73-914 (Railway Hazard Act) (A.S.A., 1943, Sec. 73-914) in so far as the two acts are necessarily inconsistent. *Murphy v. Province,* 240 S. W. 421.

Arkansas has a survival statute also. See A.S.A., 1943, Vol. 3, Sec. 27-901.

When a wife is killed by wrongful act, the husband has a cause of action for services and companionship. A.S.A., 1943, Vol. 3, Sec. 27-905; *Graysonia-Nashville Lbr. Co. v. Carroll,* 144 S. W. 519.

See *Morgan v. Rankin,* 122 S. W. (2d) 555; *Adams v. Shell,* 33 S. W. (2d) 1107.

II. The action shall be brought by the personal representative, and if none, by the heirs at law. A.S.A., 1943, Vol. 3, Sec. 27-904.

III. Damages for loss of support are recoverable in an action under the wrongful death statute. *Hines v. Betts,* 226 S. W. 165; *Mo. Pac. R. Co. v. Gilbert,* 178 S. W. (2d) 73.

The personal representative under the wrongful death statute is authorized to sue for medical, hospital and funeral expenses incurred as a result of the accident if paid by husband, wife or parent. *St. Louis,* etc., *R. Co. v. Sweet,* 40 S. W. 463.

There is no recovery under the wrongful death statute for the decedent's pain and suffering, but the same damages are recoverable in an action under the survival staute. *Hines v. Betts, supra; Webb v. Waters,* 243 S. W. 846. The actions must be brought in the same suit. *Morgan v. Rankin, supra.*

The personal representative may not recover for loss of a husband's companionship to surviving wife. *Mo. Pac. R. Co. v. Gilbert, supra.* A husband, however, may recover for loss of his wife's companionship in his action as noted in I (B), supra.

IV. Wrongful death of minor

Statute: No special statutory provision.

The value of services of a deceased child to his parents during minority, but not beyond, is recoverable. *Davis v. Gillin,* 66 S. W. (2d) 1057.

V. Statute of limitations is two years from death, A.S.A., 1943, Vol. 3, Sec. 27-904. The running of this statute does not affect actions under the survival statute as for decedent's pain and suffering, which may be brought afterwards. *St. Louis, I. M. & S. R. Co. v. Robertson,* 146 S. W. 482.

VI. There is no statutory limitation on the amount recoverable.

VII. The action for wrongful death is abated by death of the wrongdoer but not an action under the survival statute. *Brown v. Cole,* 129 S. W. (2d) 245, 122 A. L. R. 1348.

CALIFORNIA

I. Statutory provision

"When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just." California Code of Civil Procedure, 1947, Sec. 377.

II. Where the deceased is an adult, his heirs or personal representative may sue. C.C.P., Sec. 377, supra. The "heirs" are those entitled to succeed from the deceased person at death under the laws of succession, *Fiske v. Wilkie,* 154 P. 725; and those relatives who would not be entitled to take a share under the laws of succession cannot sue. *Evans v. Shanklin,* 60 P. (2d) 554. A single joint cause of action is given to all of the heirs and but one action can be brought. Hence, unless the suit is by the personal representative as trustee for the heirs, all the heirs must be joined, either as plaintiffs or defendants. *Salmon v. Rathjens,* 92 P. 733. There can be no action if there are no heirs and a complaint failing to allege the existence of heirs is fatally defective. *Webster v. Norwegian Mining Co.,* 70 P. 276.

III. There is only one cause of action for death and that is to recover the pe-

cuniary loss suffered by the heirs. If an heir has suffered no pecuniary loss, he is not entitled to any part of the recovery. *Estate of Riccoma,* 197 P. 27.

The next of kin are entitled to recover for the loss of support suffered by reason of the death of the deceased. *Gilmore v. L. A. Ry. Co.,* 295 P. 41.

The following items of damage sustained by decedent's estate are recoverable by personal representative: Property damage, *Nitta v. Haslam,* 33 P. (2d) 678; and funeral expenses. *Adams v. So. Pac. Co.,* 53 P. (2d) 121.

Medical and hospital expenses are not recoverable by the personal representative, but they are recoverable in a separate cause of action brought by the heir who incurred the expense. However, it must be shown that the claimant paid for the same. *Nitta v. Haslam, supra.*

Pain and suffering are not a subject of consideration and are not recoverable. *McLaughlin v. United Railroads,* 147 P. 149; *Griffey v. Pac. Elec. Co.,* 209 P. 45.

Either the personal representative or the heirs may include in the action a claim for services of a wife to surviving husband, or vice versa, provided the value of such services are pecuniary. *Gilmore v. L. A. Ry., supra.*

The administrator has authority to recover for "loss of companionship" sustained by surviving spouse. *Ewens v. Newman,* 21 P. (2d) 1007; *Duclos v. Tashjian,* 90 P. (2d) 140.

IV. Wrongful death of a minor

Statute: California Code of Civil Procedure, 1947, Sec. 376.

The action for death of a child rests with the father, or in the event that the parents are separated and the mother has custody or the father dead, with the mother. In the event the child is married the surviving spouse or children may sue as heirs. C.C.P., 1947, Sec. 376.

V. Statute of limitations is one year. C.C.P., 1947, Sec. 340. It would appear from inference that a personal representative is authorized to recover on behalf of the estate property damages sustained by the deceased, though the statutory period for bringing the wrongful death action for loss of support has expired. C.C.P., 1947, Sec. 377; *supra; Nash v. Wright,* 186 P. (2d) 691.

VI. There is no statutory limitation as to the amount recoverable.

VII. Action is not abated by the death of the wrongdoer as to property damage. It has further been held that loss of services constitutes property damage. *Hunt v. Authier,* 169 P. (2d) 913; *Nash v. Wright, supra.*

COLORADO

I. (A) Statutory provision

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the person who or the corporation which would have been liable if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured." Colorado Statutes Annotated, Par. 1031, Sec. 2.

B. Construction and interpretation

See *Hendry v. Holt,* 51 P. 1002; *Dwinelly v. Union Pacific R. R.,* 92 P. (2d) 741; *Grogan v. Denver & Rio Grande R. R.,* 138 P. 764; *Drake v. Hodges,* 161 P. (2d) 338.

II. The right of action in the case of death of an adult is in the husband and wife or if there is neither, or he or she fails to sue within one year, then in the heir or heirs. C.S.A., Par. 1030, Sec. 1. The personal representative has no such right. *Drake v. Hodges, supra.* The only qualification, if the same be called a qualification, to the rule that the administrator may not sue for the benefit of the estate is found in the case of a claim for damages accruing to the estate between the time of the accident and the death, where the deceased came to his death by causes other than from the accidental injury. *Kelly, Admx. v. Union Pac. R. R.,* 16 Colo. 455; *American Ins. Co. v. Naylor,* 70 P. (2d) 353.

III. From a reading of the few Colorado cases on the subject there appears to be only one cause of action which may be prosecuted by either one or all of those entitled to recover. The recovery is based upon the pecuniary loss sustained by the beneficiaries named in the statute.

Wife or husband can recover loss of earnings provided by deceased spouse, where evidence of real financial help is shown. *Denver & Rio Grande R. R. v. Gunning,* 80 P. 727; *Dillon v. Sterling Rendering Works,* 106 P. (2d) 358.

There is no recovery under the statute for damage to the decedent's estate. *Drake*

v. Hodges, supra. Funeral expenses, however, may be shown as a proper item of damage. *Tadlock v. Lloyd,* 173 P. 200; *Dillon v. Rendering Works, supra.*

There is no recovery for anguish and grief of surviving beneficiaries. *Gibson Consolidated Mining Co. v. Sharp,* 38 P. 850.

"Loss of companionship" is not a proper item of consideration because it reflects no financial loss. *Gibson Consolidated Mining Co. v. Sharp, supra; Pierce v. Connors,* 37 P. 721.

IV. Wrongful death of minor

Statute: No special statutory provision.

In the case of death of a minor or unmarried child right of action is in the father or mother who may join, or if either is dead, the survivor. C.C.A., Par. 1030, Sec. 1.

Parents may show the earning capacity and probable benefits which would have been theirs from the continued life of the son. *Southern Power Co. v. Pistana,* 251 P. 224 (adult son).

V. Statute of limitations is two years after the negligent act. C.C.A., Par. 1033, Sec. 4.

VI. The amount recoverable is limited to $5,000.00 by statute. C.C.A., Par. 1032, Sec. 3; C.C.A., Par. 1030, Sec. 1 (common carriers).

VII. It would appear that the action abates upon death of the wrongdoer, though the precise point has not been passed upon. See *Letson v. Brown,* 52 P. 287, where it was held that a simple suit for personal injuries not dependent upon statute so abated.

CONNECTICUT

I. (A) Statutory provision

"In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages not exceeding twenty thousand dollars, provided no action shall be brought to recover such damages but within one year from the neglect or fault complained of." General Statutes of Connecticut, 1949, title 63, ch. 413, Sec. 8296.

(B) Construction and interpretation.

See *Chase v. Fitzgerald et el,* 45A. (2d) 789; *Farrell v. L. G. De Felice & Son,* 42A. (2d) 697.

II. The action must be brought by the personal representative for the benefit of the heirs of the estate.

III. The cause of action comes to the personal representative by survival and is a continuance of that which the decedent could have exerted had he lived and is not one which springs from the death. *Chase v. Fitzgerald, supra; Mickel v. Coal & Coke Co.,* 132 Conn. 671.

Since damages are not based upon any loss caused to the family, such items as loss of support or services and "loss of companionship" are not considered.

Property damage to decedent's estate and medical, hospital and surgical expenses are recoverable. *Chase v. Fitzgerald, supra; Reynolds v. Maisto,* 115 A. 504. But funeral expenses, however, may not be recovered. *Farrell v. L. G. De Felice & Son, supra; Reynolds v. Maisto, supra.*

The pain and suffering of the deceased is an element of damage. *Farrell v. L. G. De Felice & Son, supra; Chase v. Fitzgerald, supra.* However, if the decedent is unconscious from the time of injury to the time of death, the pain and suffering is not considered. *Ratuskny v. Punch,* 138 A. 220.

IV. Wrongful death of minor.

Statute: No special statutory provision.

Applying the principles of *Chase v. Fitzgerald, supra,* services of a child, even before majority, are not recoverable.

V. Statute of limitations is one year from the negligent act. C.G.S., 1949, title 63, Ch. 413, Sec. 8296, supra.

VI. The maximum amount to be recovered is limited to $20,000.00. C.G.S., 1949, title 63, Ch. 413, Sec. 8296, supra.

VII. The action does not abate upon death of the wrongdoer. C.G.S., 1949, title 63, Ch. 413, Sec. 8337.

DELAWARE

I. (A) Statutory provision

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow or widower of any such deceased person, or, if there be no widow or widower, the personal representatives, may maintain an action for and recover damages for the death and loss thus occasioned." Revised Code of Delaware, 1935, 4638, Sec. 3.

(B) Construction and interpretation

See *Parvis v. Philadelphia W. & P. B. R. Co.*, 17 A. 702; *Williams v. Walton and Whann Co.*, 32 A. 726; *Cox v. Wilmington City R. R. Co.*, 53 A. 569; aff'd., 76 A. 1117; *Reed v. Queen Ann's R. R. Co.*, 57 A. 529; *Lynch v. Lynch*, 195 A. 799.

II. The right of action is in the surviving spouse and only in the personal representative in the event of his or her death. R. C. Delaware, 1935, 4638, Sec. 3, supra.

III. The personal representative has but one cause of action and that only if there be no surviving spouse. The standard charge in personal representative actions is: If you find for the plaintiff (personal representative) it should be for such sum of money as would represent whatever the deceased would have accumulated at the end of his life expectancy and left as his estate. *Skonieczny v. Churchman*, 78 A. 634. Delaware courts have now added a charge on the "present worth" in both personal representative's and widow's suits. There are no cases on this phase of damage.

With reference to damages to decedent's estate, property damage to decedent's estate would not be recoverable under the death statute; it would be, however, recoverable under ordinary common law action.

The personal representative can recover for medical and hospital expenses if paid by the estate because that would be reflected under the charge as given above, but not for funeral expenses. *Wilcox v. Wilmington City Ry. Co.*, 44 A. 686.

The personal representative has no authority to include in action value of services of a wife to surviving husband, or vice versa, even if such value is proved to be pecuniary. Presumably the surviving spouse in his or her action could get such damages as part of the general picture of damages if pecuniary loss was actually shown.

IV. Wrongful death of minor

Statute: No special statutory provision.

The right of action is in the administrator.

The measure of damages is the same as in the case of an adult. A father cannot recover in a common law action (he has no statutory action) for the loss of services of the child after its death because the father is limited solely to any loss occurring prior to death. *People's Ry. Co. v. Baldwin*, 72 A. 979.

V. There is no statute of limitations.

VI. There is no statutory limitation as to the maximum amounts recoverable.

VII. The action is not abated by death of the wrongdoer.

FLORIDA

I. (A) Statutory provision

"Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness, or default, of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." Florida Statutes, 1941, Sec. 768.01.

(B) Construction and interpretation

The death statute was not intended to afford remedy for damages suffered by the injured person, nor to preserve the right of action which the deceased might have maintained had he simply been injured and lived, but to create in the expressly enumerated beneficiaries an entirely new cause of action for damages suffered by them as a consequence of the wrongful invasion of their legal rights. *Ake et ux. v. Birnbaum*, 25 So. (2d) 213.

See also *Cline v. Powell*, 192 S. 628; *Chamberlain v. Florida Power Corp.*, 198 So. 486.

II. The right of action is in the surviving spouse; if none, in the minor child or children; if none, in persons dependent upon deceased for support; if none, then

(lastly) in the personal representative. *Florida Statues,* 1941, Sec. 768.02; *Benoit v. Miami Beach Elec. Co.,* 96 So. 158.

III. For the death of her husband a widow may recover for loss of the comfort, protection, and society of the husband and for his services in the care of the family, and she is entitled to reasonable compensation for loss of support based upon his probable future earnings and other acquisitions; and she is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower, or legacies from his estate, the sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. *Southern Utilities Co. v. Davis,* 92 So. 683. Funeral and burial expenses if recoverable must be claimed as special damages. *City of Coral Gables v. Neill,* 182 So. 432. The widow may not recover for her mental distress, nor for her husband's mental or physical suffering. *Southern Utilities Co. v. Davis, supra.*

The personal representative ordinarily cannot recover medical, hospital and funeral expenses of a deceased married woman unless she became legally liable for them. Such expenses must be claimed as special damages. *City of Coral Gables v. Neill, supra; Potts v. Mulligan,* 193 So. 767. The personal representative cannot recover for "loss of companionship," nor for the physical or other suffering either of the decedent or his relatives, nor for claims of any one for present or future support. *Florida East Coast Ry. Co. v. Hayes,* 64 So. 504, 7 A. L. R. 1310. The personal representative may recover the value at the decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for the decedent's death. *Marianna & B. R. Co. v. May,* 91 So. 553.

IV. Wrongful death of minor

Statute: Florida Statutes, 1941, Sec. 768.03.

The right of action in the case of death of a minor is in the father or if he is dead in the mother. Florida Statutes, 1941, Sec. 768.03.

In an action by father for death of a minor child damage recoverable is reasonable recompense for parental pain and suffering and value at date of trial of fair compensation for services which in reasonable probability the child would have rendered to the parents from the time of the death until the child would have become twenty-one years of age. *Miami Dairy Farms v. Unsley,* 155 So. 852; *Florida East Coast Ry. Co. v. Hayes, supra.*

V. Statute of limitations is two years from the time the cause of action accrued. Florida Statutes, 1941, Sec. 768.04; Sec. 95.11 (6).

VI. There is no statutory limitation as to the amount recoverable.

VII. The action is not abated upon death of the wrongdoer.

GEORGIA

I. (A) Statutory provisions

"The word 'homicide' as used in this chapter shall include all cases where the death of a human being results from a crime or from criminal or other negligence." Code of Georgia, 1933, Sec. 105-1301.

"A widow, or if no widow, a child or children, minor or sui juris, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence." G. C., 1933, Sec. 105-302.

"The husband and/or child or children may recover for the homicide of the wife or mother, and those surviving at the time the action is brought shall sue jointly and not separately, with the right to recover the full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action. G. C., 1933, Sec. 105-306.

"In cases where there is no person entitled to sue under the foregoing provisions of this chapter, the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin, in dependent upon the decedent, or to whose support the decedent contributed. In such case the amount of recovery shall be determined by the extent of the dependency or the pecuniary loss sustained by the next of kin. G. C., 1933, Sec. 105-1309.

(B) Construction and interpretation

See *Western & Atlantic R. Co. v. Strong,* 52 GA. 461; *Coleman v. Hyer,* 38 S.E. 962; *City of Elberton v. Thornton,* 76 S. E. 62; *Fuller v. Inman,* 74 S. E. 287.

II. As to who may sue see I (A), supra.

III. Except when the action is brought under Section 105-1309, supra, the recovery is for the "full value of the life of the de-

cedent," defined in Section 105-1308, as "the full value of the life of the decedent without deductions for necessary or other personal expenses of the decedent had he lived."

Recovery for property damage is allowed in an action under Section 105-1309, supra.

Recovery for medical, hospital and funeral expenses is not allowed. *Augusta Factory v. Davis,* 13 S. E. 577; *Southern Railway Co. v. Covenia,* 29 S. E. 219.

Damages for pain and suffering are not allowed. *Glawson v. Telephone Co.,* 71 S. E. 747. Nor are damages for "loss of companionship." *Killian v. Railroad,* 4 S. E. 165.

IV. Wrongful death of minor

Statute: G. C., 1933, Sec. 105-1307.

The right of action, where the deceased is a child, minor or sui juris, is in the mother, or, if no mother, the father. G. C., 1933, Sec. 105-1307.

The recovery authorized is for the "full value of the life of such child." G. C., 1933, Sec. 105-1307.

V. Statute of limitations is two years from death. G. C., 1933, Sec. 3-1004. The two year limitation applies when the action is brought under Section 105-1309, supra, as well as when it is brought under the other applicable sections. *Pattelis v. King,* 182 S. E. 808.

VI. There is no statutory limitation on the amount recoverable.

VII. The action does not abate when the wrongdoer dies.

IDAHO

I. (A) Statutory provision

"When the death of a person not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." Idaho Code, 1947, Vol. 2, Sec. 5-311.

(B) Construction and interpretation

See *Spokane & Inland Empire R. Co. v. Whitley,* 132 P. 121, 273 U. S. 487, 35 S. Ct. 655; *Hepp v. Ader,* 130 P. (2nd) 859; *Moon v. Bullock,* 151 P. (2d) 765.

II. The right of action in the case of wrongful death of an adult is in the heirs or personal representative. I. C., 1947, Vol. 2, Sec. 5-311, supra.

III. Property damage to decedent's estate may be recovered by the personal representative. I. C., 1947, Vol. 3, Secs. 15-804, 15-805 (personal representatives actions for waste and trespass); *Moon v. Bullock,* supra.

Heirs in their suit cannot recover for medical, hospital and funeral expenses unless they have paid for them or bound themselves to pay for them. *Hartman v. Oil Co.,* 295 P. 998; *Wyland v. Canal Co.,* 285 P. 676.

Recovery for "loss of companionship" has been had by administrator on behalf of brothers and sisters of the deceased, where there was no evidence of any other loss. *Kelly v. Lemhi Irr. & Orchard Co. Ltd.,* 168 P. 1076.

IV. Wrongful death of minor

Statute: I. C., 1947, Vol. 2, Sec. 5-310.

Where the deceased is a minor, the right of action is in the parents, but if either is dead or has abandoned the family, the other may sue alone. I. C., 1947, Vol. 2, Sec. 5-310.

V. Statute of limitations is two years. I. C., 1932, Sec. 5-219.

VI. The amount recoverable is limited to $10,000.00. Chapter 47, Page 82, Idaho Session Laws of 1949.

VII. The action does not abate upon death of the wrongdoer. Chapter 47, Page 82, Idaho Session Laws of 1949; I. C., 1947, Vol. 2, Sec. 15-805.

ILLINOIS

I. (A) Statutory provisions

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Illinois Revised Statutes, Chapter 70, Sec. 1.

"In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the

person (except slander and libel), actions to recover damage for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their duties, and actions for fraud or deceit." Illinois Revised Statutes, Chapter 3, Sec. 494.

(B) Construction and interpretation

It is to be noted that the Injuries Act (I. R. S., Chapter 70, Sec. 1, supra, and 2) creates a cause of action for the pecuniary loss which the surviving spouse and next of kin have sustained by reason of the death of a person injured by a wrongful act. The survival statute (I. R. S., Chapter 3, Sec. 494, supra), however, keeps alive the cause of action which the deceased would have had if he had lived. As these two statutes are construed, a remedy lies under the Injuries Act if an injured person dies as a result of a wrongfully inflicted injury when a person is injured but dies from a cause other than the injury, his cause of action if he had lived survives by force of the survival statute. No action arises in such a case under the Injuries Act.

See *Chicago v. Major,* 18 Ill. 349; *Ohnesorge v. Chicago City Ry. Co.,* 102 N. E. 819; *Devine v. Healy,* 89 N. E. 251, for cases construing these statutes.

II. The action must be brought by the personal representative for the exclusive benefit of the widow and next of kin. I. R. S., Chapter 70, Sec. 2.

III. The personal representative is authorized by the Injuries Act to recover only for pecuniary losses suffered by the surviving spouse and next of kin. Loss of support is considered a pecuniary loss. *Holton v. Daly,* 106 Ill. 131; *Hazel v. Bus Co.,* 141 N. E. 392.

Property damage rights of action belonging to the deceased survive by reason of the survival statute, but are not provided for in the Injuries Act. *No. Chicago Str. Ry. Co. v. Ackley,* 49 N. E. 222; *No. Trust Co. v. Palmer,* 49 N. E. 553.

Elements of damages, such as medical and hospital expenses of the character recoverable by the deceased had he lived, or by his estate under the survival statute had he died of other causes, are not recoverable in an action under the Injuries Act. *Wilcox v. International Harvester Co.,* 116 N. E. 151; *Holton v. Daly, supra.* And this is true no matter by whom paid. *Maney v. C. B. & Q. R. Co.,* 49 Ill. App. 105; *Ohnesorge v. Chgo. City Ry. Co., supra.* Note, however, that when the injured person dies from causes other than the injury, his estate may recover for medical expenses under the survival statute. *Wetherell v. Chgo. City Ry. Co.,* 104 Ill. App. 357.

No recovery is permitted under the Injuries Act for the pain and suffering, physical or mental, of the deceased prior to death, although such injuries are proper elements of damages in an action under the survival statute. *W. Chgo. Str. Ry. Co. v. Foster,* 51 N. E. 690; *Wilcox v. International Harvester Co., supra.* Damages are not allowed for the mental anguish and distress to which the family is subjected. *Conant v. Griffin,* 48 Ill. 410; *No. Chgo. Str. Ry Co. v. Brodie,* 40 N. E. 942.

The personal representative may recover under the injuries Act for the pecuniary loss of services of the deceased spouse, *Chgo. & Alton R. Co. v. Wilson,* 128 Ill. App. 88, but not for "loss of companionship." *Conover v. Coal Co.,* 161 Ill. App. 74.

IV. Wrongful death of a minor

Statute: No special statutory provision.

The administrator may recover under the Injuries Act the value of services of a deceased child to his parent. *Rockford R. I. & St. Louis R. Co. v. Delaney,* 82 Ill. 198; *City of Chgo. v. Scholton,* 75 Ill. 468.

V. Statute of limitations is one year after death. I. R. S., Chapter 70, Sec. 2.

VI. The maximum amount recoverable is $15,000.00. I. R. S., Chapter 70, Sec. 2.

VII. The action does not abate upon death of the wrongdoer due to court construction of the survival statute. *Devine v. Healey,* 89 N. E. 251.

INDIANA

I. (A) Statutory provision

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two years, and the damages shall be in such an amount as may be determined by the court or jury, but shall not exceed fifteen thousand dollars

($15,000), and subject to the provisions of this act shall inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages shall inure to the exclusive benefit of the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the decedent, not exceeding five hundred dollars; performing medical or surgical services in connection with the last illness or injury of the decedent, not exceeding five hundred dollars; to the undertaker for the funeral and burial expenses, not exceeding five hundred dollars; and to the personal representative, as such, for the costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, not exceeding five hundred dollars; and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees, not exceeding the total amount of two thousand dollars." Burns Indiana Statutes Annotated, 1933, Sec. 2-404 (Note: Section 2-404 has been amended by the Legislature in its 1949 Session and will become effective as amended probably in June or July of 1949. The amended version is given).

(B) Construction and interpretation

See *Mayhew v. Burns*, 2 N. E. 793; *Louisville, N. A. & R. Co. v. Goodykoontz*, 21 N. E. 472; *Shipley v. Daly*, 20 N. E. (2d) 653; *Lindley v. Sink*, 30 N. E. (2d) 456.

II. The action for wrongful death of an adult must be brought by the personal representative. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-404, supra.

III. The statute creates only one cause of action, which is for the benefit of one of the three following classes: (1) Surviving spouse and children, or, if none of the first class survive, then (2) next of kin, or, if none of the first two classes survive, then (3) persons furnishing hospitalization or hospital services in connection with the last illness or injury, performing medical or surgical services in connection with the last illness or injury; to the undertaker for funeral and burial expenses; and to the personal representative, as such, for costs of administering the estate, including attorney's fees. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-404, supra; *Shipley v. Daly, supra.*

The personal representative may maintain an action on account of damage to the decedent's property, not by virtue of the wrongful death statute, but by virtue of the fact that a duty rests with the personal representative to protect the assets of the estate. See Burns I. S. A., 1933 (1946 Replacement), Sec. 2-403 (survival of causes of action).

Medical, hospital and funeral expenses are not recoverable under Sec. 2-404, supra, unless no spouse, children or next of kin survive. Such expenses are recoverable, however, in the event of wrongful death of a minor. *Shipley v. Daly, supra; Lese v. Bank*, 142 N. E. 733.

Pain and suffering, and "loss of companionship" cannot be included as elements of damage under the wrongful death statute. The question is solely one of pecuniary loss. *Standard Forgings Co. v. Holstrom*, 104 N. E. 872.

The value of services of a spouse to the surviving husband or wife, insofar as they have a pecuniary value, are included in the measure of damages under the statute. *Indianapolis & Martinsville R. T. Co. v. Reeder*, 100 N. E. 101; *Hunt v. Connor*, 59 N. E. 50.

IV. Wrongful death of minor

Statute: Burns I. S. A., 1933 (1946 Replacement), Sec. 2-217. The courts hold that this section applies only in the case of death of an unemancipated child and that Sec. 2-204, supra, applies in all other cases.

The right of action for wrongful death of a child is in the father, or, in the event of his death or desertion from the family, the mother. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-217.

Services of the deceased child during minority, but not thereafter, should be considered in determining damages. *Southern Indiana R. Co. v. Moore*, 72 N. E. 479; *Thompson v. Town*, 178 N. E. 440.

V. Statute of limitations is two years. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-404, supra.

VI. The amount recoverable for wrongful death is limited to $15,000.00. Note also, the maximum amounts recoverable by persons furnishing hospital care, etc., where there are no survivors. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-404, supra.

VII. The action is not abated by death of the wrongdoer. Burns I. S. A., 1933 (1946 Replacement), Sec. 2-403. Amount of recovery limited however to $1,000.00 plus reasonable medical and hospital expenses.

IOWA

I. (A) Statutory provisions

"All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." Code of Iowa, 1946, Chapter 611, Title XXXI, Sec. 611.20.

"When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts." Code of Iowa, 1946, Chapter 635, Title XXXII, Sec. 635.9.

(B) Construction and interpretation

The Iowa sections set forth are construed as a survival statute rather than as a wrongful death act of the Lord Campbell type. The cause of action accruing to the deceased in his lifetime is held to survive to the administrator in favor of the estate; the wrongful death becoming an element of damages recoverable in such action. If the action is commenced by the administrator, the measure of recovery is the value of the estate which the deceased would reasonably have been expected to leave had he lived out the term of his natural life. If, however, the deceased commenced the action during his lifetime, the administrator may recover as though the deceased had lived to prosecute the action.

See *Donaldson v. Railroad,* 18 Iowa 88; *McCoullough v. Railroad,* 142 N. W. 67; *Kemp v. Creston Transfer Co.,* 70 F. Supp. 521.

II. The action must be brought by the personal representative if the deceased is an adult.

III. Loss of support to next of kin is not an element of damages. The view being taken that the loss sustained by persons who will receive the benefit of the administrator's recovery is irrelevant to the question of the size of the estate which would have been left by the deceased had he lived. *Cerney v. Secor,* 234 N. W. 193; *McCoullough v. Railroad, supra.*

The administrator may recover for property damage, *Union Mill Co. v. Prenzler,* 69 N. W. 876; for medical and hospital expenses, *Brady v. Haw,* 174 N. W. 331 (and this is probably true regardless of who paid these expenses, because the rule of damages applicable to actions by living plaintiffs should apply. See *Strand v. Garage Co.,* 113 N. W. 488); but not for funeral and burial expenses. However, the administrator may recover the loss sustained by the estate due to the premature death, including the interest on the amount of the funeral expenses during the time the deceased would probably have lived. *Davidson v. Vast,* 10 N. W. (2d) 12; *Hampton v. Burrell,* 17 N. W. (2d) 110.

Where the administrator commences the action, there can be no recovery for pain and suffering. But if the deceased commenced the action in his lifetime his own pain and suffering is a proper element of damages. *Donaldson v. Railroad, supra; Cerny v. Secor, supra.*

Although an administrator has no authority to recover the value of a wife's services to the surviving husband, or vice versa, an administrator of a deceased married woman's estate may recover, under Sec. 613.11, Chapter 613, Code of Iowa, the value to her estate of her services as wife or mother. *Gardner v. Beck,* 195 Iowa 62; *Bridenstine v. Iowa City Elec. R. Co.,* 165 N. W. 435.

IV. Wrongful death of minor

Statute: Iowa Rule of Civil Procedure No. 8.

The right of action for wrongful death of a minor is in the father, or if he be dead, imprisoned or has deserted the family, in the mother. Iowa Rule of Civil Procedure No. 8.

This section has been held to authorize the parent to recover medical, hospital and funeral expenses. *Carnego v. Coal Co.,* 146 N. W. 38; *Anderson v. Strack,* 17 N. W. (2d) 719. In an action by the administrator of a minor's estate under Sec. 611.20, supra, the value of the minor's services before majority is not recoverable, *Morris v. Railroad,* 26 Fed. 22; *Hinely v. Webster County,* 91 N. W. 1041. But in an action

by a parent under Rule of Civil Procedure No. 8, cited above, the parent may recover the expected value of his deceased child's services. *Carnego v. Coal Co., supra; Benton v. Railroad*, 8 N. W. 330.

V. There is no special statutory period during which death actions must be brought. The statute of limitations governing ordinary tort actions governs and begins to run at the date of injury. *Sherman v. Western Stage Co.*, 24 Iowa 515; *Gardner v. Beck, supra.*

VI. There is no statutory maximum amount recoverable.

VII. The action survives the death of the wrongdoer. Code of Iowa, 1946, Chapter 611, Title XXXI, Sec. 611.20.

KANSAS

I. (A) Statutory provision

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter or his personal representative if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. In any such action, the court or jury may award such damages as may seem fair and just under the facts and circumstances, but the damages cannot exceed fifteen thousand dollars and must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased. Damages may be recovered hereunder for, but not limited to: (a) Mental anguish, suffering or bereavement; (b) loss of society, companionship, comfort or protection; (c) loss of marital care, attention, advice, or counsel; (d) loss of filial care or attention; and (e) loss of parental care, training, guidance or education." General Statutes of Kansas, 1935 (1947 Supp.), Sec. 60-3203.

(B) Construction and interpretation

See *Pattrick v. Riggs*, 148 Kan. 741; *Moeser v. Shunk*, 116 Kan. 247; *Goodyear v. R. R. Co.*, 114 Kan. 557; *Harwood v. R. R. Co.*, 101 Kan. 215.

II. The right of action is in the personal representative. K. G. S., 1935 (1947 Supp.), Sec. 60-3203, supra. But if no personal representative is or has been appointed the widow, or if none, the next of kin may bring the action. K. G. S., 1935, Sec. 60-3204.

III. It can be seen that the statute, Sec. 60-3203, supra, though not limiting the consideration to these elements, expressly authorizes recovery for: (a) Mental anguish, suffering or bereavement; (b) loss of society, companionship, comfort or protection; (c) loss of marital care, attention, advice, or counsel; (d) loss of filial care or attention; and (e) loss of parental care, training, guidance or education.

The statute has been construed to authorize recovery of medical, hospital and funeral expenses. *Marshall v. Miller Bros.*, 112 Kan. 706; *Pattrick v. Riggs, supra.* In the absence of a showing that the surviving spouse paid these expenses, or bound his or her separate estate to pay for the same, they probably cannot be recovered. There is no case precisely in point, but see the dictum in *Marshall v. Miller Bros.*, 112 Kan. 706, P. 708.

IV. Wrongful death of minor

Statute: No special statute.

The value of services of a deceased child to his parent or parents both during minority and beyond is recoverable. *Griffin v. Brick Co.*, 113 P. 574; *Railroad Co. v. Cross*, 49 P. 599.

V. Statute of limitations is two years. K. G. S., 1935 (1947 Supp.), Sec. 60-3203, supra.

VI. There is a statutory maximum of $15,000.00 recoverable. K. G. S., 1935 (1947 Supp.), Sec. 60-3203, supra.

VII. The action is not abated by the death of the wrongdoer. K. G. S., 1935 (1947 Supp.), Sec. 60-3201; *Shively v. Burrn*, 139 P. (2d) 401.

KENTUCKY

I. (A) Statutory provision

"Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased. * * *" Kentucky Revised Statutes, 1948, Sec. 411.130.

(B) Construction and interpretation

See *Compton's Adm'r. v. Coal Co.*, 201 S. W. 20; *Smith's Adm'r. v. Bacon*, 70 S. W.

(2d) 522; *Randolph's Adm'r. v. Snyder,* 129 S. W. 562.

II. The right of action is in the personal representative. K. R. S., 1948, Sec. 411.130, supra. The action can be brought only by the personal representative, except where the personal representative refuses to bring the suit, or where there is collusion between the representative and the defendant. *L. & N. R. Co. v. Turner,* 162 S. W. (2d) 219; *Harris v. Rex Coal Co.,* 197 S. W. 1075.

III. The action authorized by the Kentucky wrongful death act is for damage sustained by the estate of the deceased on account of death. The measure of damages being the amount which would fairly compensate the deceased's estate for the permanent destruction of his power to earn money. *Wilkins v. Hopkins,* 128 S. W. (2d) 772.

Damages for loss of suport to next of kin are not recoverable. *Bessire & Co. v. Day's Adm'x.,* 103 S. W. (2d) 644.

No recovery for property damage to decedent's estate is authorized by the death statute. Such recovery is governed by K. R. S., 1948, Sec. 411.140.

Hospital and medical expenses are not recoverable in an action under the death statute. *West v. Natz' Adm'r.,* 101 S. W. (2d) 673.

Presumably damages covering funeral expenses are recoverable by the personal representative since the statute requires that such expenses be paid out of the fund recovered before distribution to the enumerated beneficiaries. See K. R. S., 1948, Sec. 411.130.

Since the measure of damages is limited to such sum as will compensate the deceased's estate for the destruction of his power to earn money, recovery is not allowed for physical or mental suffering, *L. & N. R. Co. v. Simrall's Adm'r.,* 104 S. W. 1011, or for loss of companionship.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The measure of damages for the wrongful death of a minor is the fair compensation to the child's estate for the destruction of his capacity to earn money. No recovery is allowed for the parent's sorrow or suffering. *L. & N. R. Co. v. Creighton,* 50 S. W. 227. Services of the child to the parent, even before majority, are not recoverable. *General Refractories Co. v. Mozier,* 30 S. W. (2d) 952.

V. Statute of limitations is one year from death; it being held that K. R. S., 1948, Sec. 413.140 referring to injuries to the person applies. *Salyer v. Coal Co.,* 246 F. 794; *Irwin v. Smith,* 150 S. W. 22; *Faulkner's Adm'r. v. Railroad,* 212 S. W. 130.

VI. There is no statutory limitation governing the amount recoverable.

VII. The action does not abate upon death of the wrongdoer. K. R. S., 1948, Sec. 411.140.

LOUISIANA

I. (A) Statutory provision

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother of either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

"If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons, then in favor of the surviving children of the adoptive parents, or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or

adopted person, as the case may be." Louisiana Civil Code, Article 2315 (2294) (N1382).

(B) Construction and interpretation

Two distinct rights of action are authorized: The first, authorized in the second sentence of the first paragraph of the Code Article, is that which accrued to the deceased before his death and survived him in favor of those designated. The second, authorized in the third and last paragraph of the Code Article, permits recovery of the damages sustained by reason of the wrongful death. As the right first noted accrued before death, it is not based on wrongful death; it is an action personal to the deceased; *Hugbh v. N. O. & R. R.*, 6 La. An. 495; the designee survivors have the status of subrogees, ibid; it survives irrespective of whether the death were from natural causes or wrongful. This right cannot include any of the elements of the right conferred on the survivors to recover their own damages, arising out of wrongful death. *Dougherty v. N. A. Ry. & Lt. Co.*, 63 So. 493.

See *Colorado v. Iron Works*, 83 So. 381; *Kerner v. Railroad*, 104 So. 740 for further cases construing the statute.

II. The personal representative has no right to bring the action. The right of action is in the surviving spouse or children; if none, in the parents; if none, in the brothers or sisters. L. C. C., Article 2315, supra. If there be none of the designated survivors the action abates. *Thornton v. Peak*, 191 So. 182; *Gibbs v. Railroad*, 125 So. 445.

III. If any qualified survivor were dependent for support upon the deceased, this is an item of damage arising out of wrongful death. *Kaough v. Hadley*, 167 So. 896; *Underwood v. Gulf*, 55 So. 641.

Action for property damage, medical and hospital expenses, pain and suffering or any other item of damage which the deceased could have recovered in a tort action, had he lived, is not within the scope of the wrongful death statute; however, this right survives in favor of the identical persons who may bring action for damages sustained by them by the wrongful death. It should be noted that to prevent a multiplicity of suits all of the surviving designees must present both rights of action and all cause of action in the same suit. *Reed v. Warren*, 136 So. 59; *Norton v. Ice Co.*, 150 So. 855.

An important item of damage is the value of the prospective earnings of the deceased, based upon the deceased's life expectancy and the survivor's prospective period of dependency. *Watkins v. Jahncke Dry Docks*, 125 So. 469; *Dupuy v. Godchaux Sugars*, 184 So. 730.

The survivors designated may recover for their loss of affection and companionship. *Roby v. Railroad*, 58 So. 701; *Dougherty v. N. O. Ry. & Lt. Co., supra.* So too, funeral expenses constitute an item of damage to the survivor who has paid them. *Bynum v. Suc. of Hodge et al*, 15 La. App. 223; *Churchill v. Texas Pac. Ry. Co.*, 92 So. 314. Proof must be made of the expenditure. *James et al v. Grocery Co.*, 179 So. 505.

IV. Wrongful death of minor

Statute: No special statutory provision.

The value of prospective earnings of minors may be recovered only by the dependent survivors, but the probability that the minor would have married at majority and ceased contributions is considered. *Kaough v. Hadley, supra; Edwards v. Railroad*, 185 So. 111.

V. Statute of limitations is one year from death. L. C. C., Article 2315, supra. No person may recover any item after the expiration of the statutory period within which action for wrongful death may be brought.

VI. There is no statutory limitation on the amount recoverable.

VII. On the death of the wrongdoer, action may be prosecuted against the administrator of his estate and the insurer of the deceased wrongdoer. *Ruiz v. Clancy*, 162 So. 734.

MAINE

I. (A) Statutory provision

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony." Revised Statutes of Maine, 1944, Chap. 152, Sec. 9.

"Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death, shall in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in the preceding section (Sec. 10), separately found, but in such cases there shall be only one recovery for the same injury." R. S. M., 1944, Chap. 152, Sec. 11.

(B) Construction and interpretation.

Prior to 1943, recovery for wrongful death was confined to cases where the person died without conscious suffering. If the victim died after suffering there were no damages to anyone for the death itself but only in favor of the estate for the suffering and expense during the lifetime.

Under the statute now in force the wrongful death action is brought by the personal representative for the exclusive benefit of the beneficiaries named in the statute (surviving spouse, children and heirs). Damages for the conscious suffering and other damages incurred before death go into and become part of the estate.

See *Hammond v. St. Ry. Co.*, 106 Me. 209; *Curran v. St. Ry. Co.*, 112 Me. 96; *Stone v. Railway*, 99 Me. 243.

II. The action for wrongful death must be brought in the name of the personal representative. He must also bring the action for conscious suffering and other damages preceding death. R. S. M., 1944, Chap. 152, Sec. 10.

III. Damages for the death itself are confined exclusively to the pecuniary loss suffered by the beneficiaries. *McKay v. Dredging Co.*, 92 Me. 454; *Oakes v. Railroad*, 95 Me. 103.

There is no right of action for damages sustained by the decedent's estate unless he had conscious suffering preceding death in which instance the action survives for the benefit of his estate by virtue of R. S. M., 1944, Chap. 152, Sec. 8. This includes property damage and medical and hospital expenses but not funeral expenses. All these are recoverable, however, not under the survival statute, but under the death statute as amended. See R. S. M., 1944, Chap. 152, Sec. 10.

The personal representative may recover the value of the services of a wife to the surviving husband since it represents a pecuniary loss to him. *McKay v. Dredging Co., supra.* "Loss of companionship," not being considered a pecuniary loss, is not an element of damages.

IV. Wrongful death of minor

Statute: No special statutory provision.

The value of services of a deceased child to its parents during minority is recoverable. *Welch v. Railroad*, 86 Me. 552.

V. Statute of limitations is two years from death. R. S. M., 1944, Chap. 152, Sec. 10. This statute has no application to actions under the survival statute.

VI. The amount recoverable in death actions is limited to $10,000.00. R. S. M., 1944, Chap. 152, Sec. 10.

VII. Death of the wrongdoer does not abate the wrongful death action. R. S. M., 1944, Chap. 152, Sec. 8.

MARYLAND

I. (A) Statutory provision

"Whenever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, or the executor or administrator of the said person who would have been liable in case of the death of the said person who would have been liable, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony; provided, however, that any such action against the executor or administrator of the said person who would have been liable shall be commenced within six calendar months after the death of the said person who would have been liable." Flack's Annotated Code of Maryland, 1939, Article 67, Sec. 1.

(B) Construction and interpretation

The above quoted provision of the Code must be construed with Article 93, Sec. 109 (Flack's Annotated Code of Maryland, 1939, Art. 93, Sec. 109), which provides that

personal representatives shall have full power to commence and prosecute any personal action whatever which the deceased might have commenced and prosecuted, except actions of slander. Article 67, Secs. 1, supra, and 2, provide that when the death is caused by wrongful act, the party who would have been liable in an action therefor, had death not ensued, shall be liable to an action of damages to be brought in the name of the State for the benefit of the wife, husband, parent or child, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whose benefit the action is brought. Under these statutes there are thus two separate and distinct causes of action arising out of the same wrongful act. *Stewart v. United Rwys.,* 65 A. 49.

See *Melitch v. United Rwys.,* 88 A. 229; *Elder v. Railroad,* 95 A. 65; *Tucker v. State,* use of Johnson, 89 Md. 471.

II. Where the action is under the wrongful death act (Flack's A. C. of Md., Article 67), it is brought by and in the name of the State for the use of the wife, husband, parent or child.

The personal representative brings actions under the survival statute (Flack's A. C. of Md., Art. 93, Sec. 1091.

III. The equitable plaintiffs in an action brought by the State under Article 67 are to be compensated for their pecuniary loss only. *Tucker v. State,* use of Johnson, *supra.* But in a later case the court held that a minor child should not be limited solely to the pecuniary loss resulting from his mother's wrongful death, but should be allowed to recover for "intangibles" such as benefits and advantages he might have been expected to receive from the continuance of her life. *Davidson Transfer & Storage Co. v. State,* use of Brown, 22 A. (2d) 582.

Damages for injury to decedent's property and medical, hospital and funeral expenses are recoverable by the personal representative in an action under Article 93, Sec. 109, but not by the equitable plaintiffs in an action under the wrongful death statute. *Stewart v. United Rwys., supra.*

IV. Wrongful death of minor

Statute: No special statutory provision.

A parent in an action under Article 67, may recover value of services of a deceased minor up to the time the minor would have reached the age of twenty-one, but not afterwards. *Pikesville R. Co. v. State, use of Russell,* 88 Md. 573.

V. Actions under Article 67 must be commenced within twelve calendar months after death, unless the wrongdoer dies within such period, in which case the action must be brought within six months after the wrongdoer's death, and also within one year after the death of the person. Flack's A. C. of Md., Article 67, Sec. 1, supra, and 4.

Actions under Article 93, Sec. 109, must be brought within three years from the time of the injury as distinguished from the time of death. However, should the wrongdoer die during the three year period, the action must be brought within six months of his death as well as within three years.

VI. There is no statutory limitation of the amount recoverable.

VII. Death of the wrongdoer does not abate the right of action, but the action must be instituted within six months after the wrongdoer's death. See VI, supra.

MASSACHUSETTS

I. (A) Statutory provision

"If the proprietor of a common carrier of passengers, including a corporation operating a railroad, street railway or electric railroad, by reason of his or its negligence, or wilful, wanton or reckless act, or by reason of the unfitness or negligence, or the wilful, wanton or reckless act, of his or its agents or servants while engaged in his or its business, causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in his or its employment or service, or if any person other than such a common carrier, except as provided in section one, so causes the death of a person in the exercise of due care who is not in his or its employment or service, he or it shall be liable in damages, in an amount not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the pecuniary loss sustained by the parties entitled to benefit hereunder and recovered by the executor or administrator of the deceased person in an action of tort, commenced within two years after the injury causing the death * * *" Annotated Laws of Massachusetts, 1948 Supp., Vol. 7, Chap. 229, Sec. 2.

(B) Construction and interpretation.

Section one of the statute (A. L. M., 1948 Supp., Vol. 7, Chap. 229, Sec. 1) outlines the liability of counties, cities, towns and persons causing death by reason of failure to repair a causeway or bridge.

It is not possible at this time to furnish an authoritative report on the Massachusetts Death Act, particularly with respect to the damages recoverable for wrongful death itself, because the present act, which has been in effect only since January 1, 1947, differs radically from the former act, and so far, no action brought under the present statute has been passed upon by the Supreme Judicial Court. The former act was in the main penal in nature and provided that damages for death be assessed with reference to the degree of culpability of the wrongdoer. It is generally agreed that the Legislature intended to substitute a compensatory act, since the damages are to be assessed with reference to the pecuniary loss sustained by beneficiaries.

II. Right of action is in the personal representative. A. L. M., 1948 Supp., Vol. 7, Chap. 229, Secs. 1 and 2.

III. Although there are no cases, it is believed that damages for loss of support and loss of services if shown to have a pecuniary value, but not for "loss of companionship," are recoverable. See I (B), supra.

The personal representative may recover for property damage to decedent's estate and for "expenses incurred by a husband, wife, parent or guardian for medical, nursing, hospital or surgical services in connection with or on account of such injury" under G. L., Chap. 228, Sec. 1, as amended (survival statute). *Barron v. Watertown,* 211 Mass. 46; *Eldridge v. Barton,* 232 Mass. 183.

It is specially provided that damages for conscious suffering are recoverable under a separate count in a wrongful death action, however, such recovery is held and disposed of as assets of the estate. A. L. M., 1948 Supp., Vol. 7, Chap. 229, Sec. 6.

IV. There is no special statutory provision for death of a minor.

V. Statute of limitations is two years from the time of injury. A. L. M., 1948 Supp., Vol. 7, Chap. 220, Sec. 2. But there is a one year limitation where the action is brought under Section 1 (death by reason of failure to repair a bridge, see I (B), supra). These limitations do not affect survival statute actions.

VI. There is a statutory maximum of $1,000.00 recoverable in actions under Section 1, and of $15,000.00 in action under Section 2. Note also, the statutory minimum of $2,000.00 where the action is under Section 2.

VII. The action does not abate upon death of the wrongdoer. Chap. 229, General Laws, Sec. 5A.

MICHIGAN

I. (A) Statutory provision

"Be it enacted by the senate and house of representatives of the State of Michigan, whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act." Sec. 14061 (Michigan Annotated Statutes, 1945, Sec. 27.711 et seq.).

(B) Construction and interpretation

The quoted section, as amended in 1939, was enacted to abolish the distinction between instantaneous death and death following injury and to enable a person to bring his action under this statute regardless of whether there was instantaneous death or survival of the injured person. It does not repeal the so-called Survival Statute (Sec. 14040; M. H. S., 1945, Sec. 27.684 et seq.), except insofar as the latter statute is inconsistent. In re *Olney's Estate,* 14 N. W. (2d) 574.

M. H. S., Sec. 27.711, supra, et seq., provides that all actions for wrongful death, or for injuries resulting in death, shall be brought only under such action. *Baker v. Slack,* 30 N. W. (2d) 403.

II. The action must be brought by and in the name of the personal representative of the deceased. Sec. 14062.

III. Sec. 14062 (M. H. S., 1945, Sec. 27.711 et seq.), specifies that recovery may be had for (1) "the pecuniary injury resulting from such death to those persons

who may be entitled to such damages" and in addition (2) "for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable," and (3) "reasonable compensation for the pain and suffering * * *" The damages recoverable in the action under the Survival Statute (Sec. 14040) have been construed to be inconsistent with the provisions of the Death Act and to that extent the former statute is repealed. Therefore, in any action to recover damages for death, or for injuries resulting in death, the damages recoverable are limited to those specified in Sec. 14062.

Despite the use of the words "for which the estate is liable" in the statute (Sec. 14062), recovery may be had for medical, hospital and funeral expenses notwithstanding the fact that one of the beneficiaries, rather than the estate, is liable for such expense. The view being that such constitutes "pecuniary injury resulting from such death." *Rufner v. Traverse City,* 295 N. W. 620.

The personal representative can recover for "pecuniary injury" to the next of kin only to the extent that the decedent owed a legal duty to contribute to the support of such persons. *Baker v. Slack,* 30 N. W. (2d) 403.

Loss of support is "pecuniary injury" and damages for such injury are recoverable within the limits defined in the last paragraph. *Bricker v. Green,* 21 N. W. (2d) 105; *Schmidt v. Willbrandt,* 21 N. W. (2d) 194.

By the express words of the statute (Sec. 14062) damages for the pain and suffering of the deceased while conscious are recoverable.

The loss of services of a wife constitutes a "pecuniary injury," and the value of the same, less the reasonable cost of the wife's maintenance, may be recovered. In re *Olney's Estate, supra; Grimes v. King,* 18 N. W. (2d) 870.

IV. Wrongful death of minor

Statute: No special statutory provision.

The value of services of a deceased child, less the reasonable cost of maintenance, during minority are recoverable.

V. Statute of limitations is three years after the cause of action accrues. Sec. 13976, Sec. 13981, extends by two years (after the granting of letters testamentary or of administration) where the claim is barred by other applicable provisions.

VI. There is no statutory limitation as to the amount recoverable.

VII. The action does not abate with the death of the wrongdoer. *Ford v. Maney's Estate,* 232 N. W. 393; in re *Olney's Estate, supra.*

MINNESOTA

I. (A) Statutory provision

"When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed $10,000, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of persons dying intestate; but funeral expenses and any demand for the support of the decedent other than old age assistance, duly allowed by the probate court, shall first be deducted and paid. If an action for such injury shall have been commenced by such decedent, and not finally de termined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section." Minnesota Statutes Annotated, Sec. 573.02.

(B) Construction and interpretation.

See *Keiper v. Anderson,* 165 N. W. 237; *Cashman v. Hedberg,* 10 N. W. (2d) 388.

II. The right of action is in the personal representative. M. S. A., Sec. 573.02, supra.

III. The statute authorizes the personal representative to recover damages for loss of support to next of kin. *Wiester v. Kaufer,* 247 N. W. 237. He may also recover for loss of services of a wife to surviving husband, or vice versa, provided the value is shown to be pecuniary. *Hoppe v. Peterson,* 265 N. W. 338.

Property damage to decedent's estate is not recoverable. See M. S. A., Sec. 573.01.

Claim for medical, hospital and funeral expenses may be included in the personal representative's action, but only if incurred

on behalf of the decedent or his estate. *Prescott v. Swanson,* 267 N. W. 251.

The personal representative has no authority to recover for "loss of companionship" sustained by surviving spouse. *Hutchins v. Railway,* 46 N. W. 79.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The personal representative may recover value of services of a deceased child to his parent or parents. *Heitman v. Lare City,* 30 N. W. (2d) 18.

V. The statute of limitations is two years from the act or omission. M. S. A., Sec. 573.02, supra. Damages for property injury to decedent's estate and medical, hospital and funeral expenses are not recoverable after the statutory period for bringing wrongful death action for loss of support to dependents or next of kin has expired. M. S. A., Sec. 573.01.

VI. The maximum amount recoverable is $10,000.00. M. S. A., Sec. 573.02, supra.

VII. Causes of action arising out of tort survive the death of the wrongdoer only if arising out of negligence. If the death is caused by contract, all causes survive. M. S. A., Sec. 573.01.

MISSISSIPPI

I. (A) Statutory provision

"Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case affect the right of recovery.* * *" Mississippi Code 1942, Vol. 2, Sec. 1453.

(B) Construction and interpretation.

See *Mississippi Power Co. v. Archibald,* 196 So. 760; *I. C. R. R. Co. v. Fuller,* 63 So. 265; *Hasson Grocery Co. v. Cook,* 17 So. (2d) 791; *Belzoni Hardwood Lumber Co. v. Langford,* 89 So. 919.

II. The action under this statute may be maintained either by the beneficiaries named in the statute (surviving spouse and/or children, father, mother, brother or sister) or in the name of the personal representative. As between the named beneficiaries and the administrator, the one who first brings the action for death has the right to prosecute and maintain it to conclusion to the exclusion of the other. *Mississippi Power & Light Co. v. Smith* 153 So. 376. An action under the statute may be maintained by one of the beneficiaries without joining the others, but in such case only one suit can be maintained and recovery is for the benefit of all of the beneficiaries. *Kelly, Sheriff, v. Howard,* 54 So. 10; *G. & S. I. R. R. Co. v. Bradley,* 69 So. 666; M. C., 1942, Vol. 2, Sec. 1453.

III. As noted above there can be but one suit for the same death which shall enure for the benefit of all the beneficiaries named in the statute.

Loss of companionship, protection and society of the decedent, but not by way of solatium, are elements of damage which are recoverable. *St. Louis & San Francisco R. R. Co. v. Moore,* 58 So. 471; *G. & S. I. R. R. Co. v. Boone,* 82 So. 335.

It would appear that property damage, medical and hospital expense incurred for treatment rendered decedent, and funeral expenses are recoverable elements of damage even though the same are incurred by the decedent or his estate or incurred and paid by beneficiaries under the statute. *St. Louis & San Francisco R. R. Co. v. Moore, supra.*

Damages for the pain and suffering of the decedent are recoverable. *Belzoni Hardware Co. v. Cinquimani,* 102 So. 470. But no recovery for pain and suffering is allowed where decedent was instantly killed or unconscious until death. *Standard Oil Co. v. Crane,* 23 So. (2d) 297.

Either the personal representative or the statutory beneficiaries, whichever institutes the action, may recover value of services of a wife to her surviving husband, or vice versa, where the same is shown to be pecuniary. *Natchez Coca Cola Bottling Co. v. Watson,* 133 So. 677.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The value of services of a deceased child to his surviving parents is a recoverable element of damage. But the value of such services following majority are not recoverable, though the surviving parents are entitled to recover gratuities which they had reasonable expectations of receiving from a

child after reaching his majority. *Cumberland Telephone & Telegraph Co. v. Anderson,* 41 So. 263.

V. The statute of limitations is one year from time of death. M. C., 1942, Vol. 1, Sec. 728. When the statutory period of limitations has expired, no further action for any damages resulting can be maintained. *Foster v. Railroad,* 18 So. 380.

VI. There is no statutory limitation on the amount recoverable for wrongful death.

VII. An action under the statute is not abated by the death of the wrongdoer. M. C., 1942, Vol. 1, Sec. 611. However, in such instances suit cannot be brought against the personal representative of the deceased until after the expiration of six months from the date letters are issued. M. C., 1942, Vol. 1, Sec. 612.

MISSOURI

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." Missouri Revised Statutes, 1939, Sec. 3653.

(B) Construction and interpretation.

Since other statutory sections governing actions for wrongful death are all dependent upon Section 3652 (M. R. S., 1939, Sec. 3652), that Section, though primarily applicable to carriers, form a part of the other death statutes. Due to the limited space available it is impossible to reproduce in this report the lengthy wording of Section 3652.

For cases construing Section 3652, see *State ex rel Thomas v. Dawes,* 283 S. W. 51; *Chamberlain v. Coach Lines,* 189 S. W. (2d) 538; *Boysinger v. Houser,* 199 S. W. (2d) 644.

For cases construing Section 3653, see *Cummins v. Public Service Co.,* 66 S. W. (2d) 920; *Jordan v. Ry., L. H. & P. Co.,* 73 S. W. (2d) 205; *Jackson v. Railroad,* 211 S. W. (2d) 931.

II. Right of action in the case of death of an adult is in the surviving spouse and if there is none or he or she fails to bring the action within six months after death, in the minor children. The personal representative brings the action if there are neither surviving spouse nor children. M. R. S., 1939, Sec. 3652.

III. Damages are to be assessed "with reference to the necessary injury resulting from such death, to the surviving parties * * *, and also having regard to the mitigating and aggragating circumstances attending such wrongful act, neglect or default." M. R. S., 1939 (as amended by Laws 1945), Sec. 3654; *Wilkerson v. Railroad,* 69 S. W. (2d) 299; *Howard v. Thompson,* 157 S. W. (2d) 780.

The action is not maintainable on behalf of decedent's estate as such, consequently such elements as property damage to decedent's estate are not considered.

Medical and hospital expenses are recoverable only where there is legal obligation on the part of the survivor to furnish them. *McCullough v. Lumber Co.,* 216 S. W. 803; *Hickman v. Ry. Co.,* 22 Mo. App. 344.

Likewise funeral expenses may be recovered where legal obligation to furnish exists. *Rains v. Ry Co.,* 71 Mo. 164; *McCullough v. Lumber Co., supra; Miller v. Williams,* 76 S. W. (2d) 355.

There can be no recovery for decedent's pain and suffering.

The person having the right to sue may include a claim for value of services of a wife to surviving husband, or vice versa, but not for "loss of companionship." *Smith v. Simpson,* 288 S. W. 69; *Schaub v. Railway Co.,* 16 S. W. 924.

IV. Wrongful death of minor.

Statute: No special statutory provision.

In the case of death of an unmarried minor the right of action is first in the parents, who may join, or the survivor if either be dead. The administrator may sue only if both parents are dead. M. R. S., 1939, Sec. 3652.

The surviving parent or parents have authority to sue for services of a minor to majority. *Oliver v. Morgan,* 73 S. W. (2d) 993; *Spalding v. Robertson,* 206 S. W. (2d) 517.

V. Statute of limitations is one year from time cause of action accrues. M. R. S., 1939, Sec. 3656.

VI. The amount recoverable is limited to $15,000.00. M. R. S., 1939 (as amended by Laws 1945), Sec. 3654. It would appear that amount recoverable from carriers under Section 3652 is still limited to $10,000.00.

VII. Action is not abated by reason of death of wrongdoer, even if suit has not been instituted against wrongdoer before his death. M. R. S., 1939 (as amended by Laws 1947), Sec. 3670.

MONTANA

I. (A) Statutory provision.

"When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." Revised Code of Montana, 1935, Sec. 9076.

(B) Construction and interpretation.

There are two causes of action for wrongful death in Montana: That for the benefit of the dependent heirs, under the so-called Death Statute (R. C. M., 1935, Sec. 9076, supra; and, that for the benefit of the decedent's estate, under the Survival Statute (R. C. M., 1935, Sec. 9086).

For the distinction between the two causes of action see *Dillon v. Railway*, 100 P. 960; *Batchoff v. Copper Co.*, 198 P. 132.

II. Where the deceased is an adult and the action is brought under the Death Statute, the right to sue is either in the heirs or personal representative. R. C. M., 1935, Sec. 9076. Actions under the Survival Statute must be instituted by the personal representative. R. C. M., 1935, Sec. 9086.

III. Loss of support to next of kin dependent upon the decedent is recoverable under the Death Statute. *Dillon v. Railway, supra; Mize v. Telephone Co.*, 100 P. 971.

Property damage and medical and hospital expenses are recoverable by the estate under the Survival Statute. *Dillon v. Railway, supra.* Recovery of funeral expenses has been allowed in trial courts, though there are no appellate decisions on the point. If the medical, hospital and funeral expenses are paid by the husband, wife or parent they are included in the action under the Death Statute; if by the estate, in the action under the Survival Statute.

Damages for the decedent's pain and suffering are recoverable under the Survival Statute. *Dillon v. Railway, supra; Melzner v. Railway*, 127 P. 146.

In an action under the Survival Statute the personal representative may recover for diminution or impairment of the decedent's earning capacity during period of life decedent would probably have lived. *Melzner v. Railway, supra; Beeler v. Butte & London C. D. Co.*, 110 P. 528.

In an action under the Death Statute the personal representative or surviving heir or spouse may recover pecuniary loss on account of being deprived of "comfort, protection, society and companionship." *Mize v. Telephone Co., supra, Neary v. Railway*, 110 P. 226.

IV. Wrongful death of minor.

Statute: R. C. M., 1935, Sec. 9075.

In the event of wrongful death of a minor the father, or in case of his death or desertion, the mother may maintain the action under the Death Statute. R. C. M., 1935, Sec. 9075. The administrator sues under the Survival Statute. R. C. M., 1935, Sec. 9086.

The value of services during minority may be recovered by the parents under the Death Statute. *Liston v. Reynolds*, 223 P. 507; *Burns v. Eminger*, 84 Mont. 397. Where there is evidence of dependency and support, the parent may also recover for services subsequent to majority. *Hollenback v. Stone & Webster Corp.*, 120 P. 1058; *Gillman Hdwe. So.*, 111 P. 550.

V. Statute of limitations is three years. R. C. M., 1935, Sec. 9031.

VI. There is no statutory limitation on amount recoverable for wrongful death.

VII. Action is not abated by death of wrongdoer. R. C. M., 1935, Sec. 9086; *Anderson v. Wirkman*, 215 P. 224.

NEBRASKA

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as

amount in law to a felony." Nebraska Revised Statutes, 1943, Sec. 30-809.

(B) Construction and interpretation.

In Nebraska two causes of action exist in the personal representative: That under the wrongful death statute (N. R. S., 1943, Sec. 30-809, supra), whereby the personal representative may recover on behalf of the surviving spouse and next of kin such damages as they have sustained by reason of the death; and, that under the survival provision of the Constitution (Nebr. Const., Art. I, Sec. 13; *Wilfong v. St. Ry. Co.,* 262 N. W. 537; *Rehn v. Bingaman et al,* 36 N. W. (2d) 856), whereby the personal representative may recover, entirely aside from the cause of action authorized by the wrongful death statute, on behalf of the estate for damages to the estate.

Where the deceased is a married woman, there exists in the widower a cause of action separate and distinct from the personal representative's causes of action. This cause of action arises by force of the common law and authorizes recovery for loss of "services and companionship and for medical, hospital and burial expenses." *Boell v. Overbaugh,* 3 N. W. (2d) 439.

See *Chicago R. I. & P. Ry. Co. v. Zernecke,* 82 N. W. 26, aff'd., 22 S. Ct. 229, 183 U. S. 582; *Gengo v. Mardis,* 170 N. W. 841; *Hindmarsh v. Bath Co.,* 187 N. W. 806.

II. The right of action in wrongful death actions, as well as in actions under the survival provision, is exclusively in the personal representative. N. R. S., 1943, Sec. 30-810.

III. Under the wrongful death statute the personal representative may recover for the loss of support to the surviving spouse and next of kin where the same is shown to have a pecuniary value. *Nilson v. Railroad,* 121 N. W. 1128; *Fisher v. Trester,* 229 N. W. 903. He may also recover in such action the value of services of a deceased wife to her surviving husband if such value is proved to be pecuniary. *Moran v. Moran,* 246 N. W. 711.

Funeral expenses are recoverable in an action under the death statute only if the husband, wife or parent has paid them, and probably only if the beneficiary was legally liable therefor. *Killon v. Dinklage,* 236 N. W. 757.

Medical, hospital and surgical expenses are recoverable in a wrongful death action only if paid by the beneficiaries. *Killon v. Dinklage, supra.* Such expenses of a husband and father are recoverable in an action under the survival provision. *Vanderlippe v. Midwest Studios,* 289 N. W. 349.

The personal representative, though not so authorized by the death statute, may include in his cause of action under the survival provision, a claim for the pain and suffering of the deceased, but only such as is suffered while conscious. *Vanderlippe v. Midwest Studios, supra.* The mental anguish of the surviving spouse or next of kin is probably not an element of damage in the death statute action. *Ensor v. Compton,* 194 N. W. 459.

Except as hereinbefore noted with reference to a widower's suit (see I (B), supra) damages based upon "loss of companionship" are not recoverable. *Elliott v. City,* 166 N. W. 621. However, there is some indication that if there is a pecuniary value proved such would be recoverable. See *Moran v. Moran, supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

The value of services of a child to his parents during minority and beyond are recoverable by the administrator in his action under the death statute if the evidence shows a reasonable expectation of benefits from such services. *Draper v.* Tucker, 95 N. W. 1026; *Fisher v. Trester, supra.* Such value must be shown to be pecuniary, but as much is presumed where the beneficiary is legally entitled thereto, such as in the case of a father to his minor son's services. *Killon vs. Dinklage, supra.*

V. Statute of limitations is two years from death. N. R. S., 1943, 30-810. It would appear that the two year limitations applies only to actions under the wrongful death statute and not to actions under the survival provision.

VI. There is no statutory limitation as to the amount recoverable.

VII. The action does not abate upon death of the wrongdoer. N. R. S., 1943, Sec. 25-1401; *Rehn v. Bingaman et al, supra.*

NEVADA

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then and in every case, the person who, or the corporation

which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony." Nevada Compiled Laws, 1929, Sec. 9194.

(B) Construction and interpretation.

See *Pardini v. City*, 263 P. 768; *Perry v. Mining Co.*, 13 Fed. (2d) 865; *Nordyke v. Pastrell*, 7 P. (2d) 598.

II. The right of action, where the decedent is an adult is in the personal representative. N. C. L., 1929, Sec. 9195.

III. Loss of support is recoverable. *Christensen v. Paper Co.*, 92 P. 210.

There are no authorities as to whether damages sustained by decedent's estate are recoverable.

Damages for "loss of companionship" are recoverable. *Benner v. Truckee River Co.*, 193 Fed. 740.

IV. Wrongful death of minor.

Statute: N. C. L., 1929, Sec. 8553.

In the case of wrongful death of a minor the mother and father jointly or separately may maintain the action. N. C. L., 1929, Sec. 8553.

The parents have authority to recover for the value of the services of the child. *Christensen v. Paper Co., supra.*

V. Statute of limitations is two years. N. C. L., 1925, Sec. 8524.

VI. There is no statutory limitation as to the amount recoverable.

VII. There is no case in point as to whether the action abates upon death of the wrongdoer.

NEW HAMPSHIRE

I. (A) Statutory provisions

"Actions of tort for physical injuries to the person, although inflicted by a person while committing a felony, and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise." Revised Laws of New Hampshire, 1942, Chap. 355, Sec. 9.

"If an action is not then pending, and has not already become barred by the Statute of Limitations, one may be brought for such cause at any time within two years after the death of the deceased party, and not afterwards." R. L. N. H., 1942, Chap. 355, Sec. 11.

(B) Construction and interpretation.

See *Holland v. Company*, 83 N. H. 482; *Ross v. Eaton*, 90 N. H. 271; *Arsenault v. Lepage*, 84 N. H. 497; *Austin v. Railroad*, 89 N. H. 309.

II. The right of action is in the personal representative.

III. Sec. 12 (R. L. N. H., 1942, Chap. 355, Sec. 12), specifies the elements of damage. The elements listed are: (1) The "mental and physical pain" suffered by the deceased, (2) the "reasonable expenses occasioned to his estate by the injury," (3) the "probable duration of his life but for the injury," and (4) "his capacity to earn money."

Properly speaking, property damage is not includible in an action for wrongful death but is rather a separate cause of action under R. L. N. H., 1942, Chap. 355, Secs. 7 and 15 (essentially a survival statute).

Medical and hospital expenses may be included as elements of damage in an action under the death statute. It being provided in the statute that reasonable charges for the "last sickness" be deducted from the sum recovered before distribution. R. L. N. H., 1942, Sec. 14. For the same reason, funeral expenses incurred are recoverable. R. L. N. H., 1942, Sec. 14; *McCarthy v. Souther*, 83 N. H. 29.

The personal representative has no authority under the death statute to recover for "loss of services" or for "loss of companionship." *Guevin v. Railway*, 78 N. H. 289.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The value of services of a deceased child is not actionable by the administrator in an action for wrongful death. The value of services may have a bearing as evidence of the deceased child's earning capacity, but it is not a ground for a separate cause of action in New Hampshire.

V. Statute of limitations is two years after death. R. L. N. H., 1942, Chap. 355, Sec. 11.

VI. The amount recoverable is limited to $7,000.00 except in cases where the decedent has left either a widow, widower or minor children or a dependent father or mother, when the damages recoverable cannot exceed $10,000.00. R. L. N. H., 1942, Chap. 355, Sec. 13. Note, however, that if the decedent commenced the action before his death, the statutory limitations do not apply. *Piper v. Railroad*, 75 N. H. 435.

VII. The action for wrongful death is not abated by death of the wrongdoer. R. L. N. H., 1942, Chap. 355, Sec. 10; *Stone v. Johnson,* 89 N. H. 329.

NEW JERSEY

I. (A) Statutory provisions.

"When the death of a person is caused by the wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable for damages for the injury if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although his death was caused under circumstances amounting in law to a felony." New Jersey Revised Statutes, Sec. 2:47-1.

"Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living." R. S., Sec. 2:26-9.

(B) Construction and interpretation.

The cause of action provided for by the Death Act (R. S., Sec. 2:47-1, supra) is entirely separate and distinct from that created by the survival statute (R. S., Sec. 2:26-9, supra). The former is for the loss resulting to the persons pecuniarily damaged by his death; the latter is for the tortious injury to the person or property of the deceased during his lifetime. *Soden, Exec. v. Traction Corp.,* 127 A. 558; *Prudential Ins. Co. v. Laval,* 23 A. 908.

II. Under the Death Act the right of action is in the personal representative as it is when the suit is brought under the survival statute. R. S., Sec. 2:47-2; R. S., Sec. 2:26-9, supra.

III. Loss of support to next of kin dependent upon decedent may be shown in an action under R. S., Sec. 2:47-1, supra.

Damage to property, and medical and hospital expenses are recoverable in the action created by R. S., Sec. 2:26-9, supra. *Saslow v. Previti,* 2 A. (2d) 811. Funeral expenses, on the other hand, are not recoverable under either act. *Consolidated Tractor Co. v. Hone,* 38 A. 759.

When medical and hospital expenses are paid by a volunteer they may be recovered. Sussman v. Sussman, 156 A. 496. The personal representative of a deceased married woman cannot recover for such expenses unless contracted for as her separate obligation. The expense of her cure must be recovered by her husband. *Klein v. Jewett,* 26 N. J. Eq. 474.

Damages for pain and suffering are allowable in the action under R. S., Sec. 2:26-9, *supra. Sussman v. Sussman, supra.* But there is no recovery under either statute for damages resulting from "loss of companionship," such not being a pecuniary loss. *Cooper v. Electric Co.,* 44 A. 663.

It has been held that where the husband's claim for pecuniary loss by reason of his wife's death was based upon her services as a housekeeper in the home, a substantial verdict was justified. *Cordts v. Vanderbilt,* 147 A. 464.

IV. Wrongful death of minor.

Statute: No special statutory provision.

A jury may consider the loss of earnings of an unemancipated child, but should also consider the cost to parents for maintenance and support. *Maher v. Magnum Co.,* 123 A. 868. They may consider not only the decedent's earnings until he reaches twenty-one, but also the voluntary contributions he would make to his parents and next of kin after he reached that age. *Kapko v. Poultry Co.,* 2 N. J. Misc. 485.

V. The applicable statutes of limitations are the two-year statute for bodily injury (R. S., Sec. 2:24-2), and the six-year statute for damage to personal property (R. S., Sec. 2:24-1).

VI. There is no statutory limit on the amount recoverable for wrongful death.

VII. The action for death by wrongful act is not abated by the death of the wrongdoer. R. S., Sec. 2:26-10; *Hackensack Trust Co. v. Vanden Berg* 97 A. 148.

An action for property damage to the decedent's estate may be instituted under the provision of N. M. S. A., 1941, Sec. 19-701. This is a survival statute and not part of the death by wrongful act statute.

The Supreme Court of New Mexico has never passed upon the question of recovery of medical, hospital and funeral expenses, but it is generally held they are not recoverable under the death statute, not being specifically listed or enumerated in Section 24-103. The same rule holds true as to damages based upon the pain and suffering of the deceased.

Again, the Supreme Court has never passed upon the question of recovery for loss of services to the surviving spouse, but

such damages are held recoverable by trial courts which generally instruct the jury to include the value of such services provided it is shown to be pecuniary.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The value of services of a deceased child to his parents is recoverable. *Mares v. Public Service Co., supra.*

V. Statute of limitations for wrongful death actions is one year from the time the cause of action accrues. N. M. S. A., 1941, Sec. 24-102. This statute refers only to actions under the wrongful death statute and not to actions to recover for property damage under Section 19-701.

VI. There is no statutory limitation of the amount recoverable except in the case of common carriers whose liability is limited to $10,000.00. N. M. S. A., 1941, Sec. 24-104.

VII. The action is not abated by the death of the wrongdoer. N. M. S. A., 1941, Sec. 19-701.

NEW MEXICO

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." New Mexico Statutes Annotated, 1941, Sec. 24-101.

(B) Construction and interpretation.

There are two separate causes of action allowed under the New Mexico Act. The first cause of action is set forth in Sections 24-101, supra, and 24-103, and is brought by the personal representative when the tort feasor is other than a common carrier. The second cause of action appearing in Section 24-104, applies when the death is caused by a common carrier.

See *Whitmer v. El Paso & S. W. Co.,* 201 Fed. 193; *Trujillo v. Prince,* 78 P. (2d) 145; *Mares v. Public Service Co.,* 82 P. (2d) 257.

II. The right of action, except where the suit is against a common carrier, is in the personal representative. N. M. S. H., 1941, Sec. 24-103. Where the defendant is a common carrier, the surviving spouse, or if none, the minor children may sue. But when the deceased is a minor and unmarried, the parents may sue. If the deceased is a child having attained the age of twenty-one and unmarried the dependent parent or dependent brother or sister, who may join, have the right of action. N. M. S. H., 1941, Sec. 24-104.

III. Damages for loss of support to next of kin dependent upon deceased are recoverable. *Mares v. Public Service Co. supra; Dunkin v. Madrid,* 101 P. (2d) 382.

NEW YORK

I. (A) Statutory provision.

"The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit." McKinney's, Consolidated Laws of New York, 1948, Book 13, Sec. 130.

(B) Construction and interpretation.

Under the above quoted provision damages are allowed, not for injury to the estate, but for an injury to the beneficiaries' estates resulting from the loss of the decedent. *Stutz v. Cab Corp.,* 74 N. Y. S. 818. Damages to the decedent's estate are recoverable in an action under Section 119 (McKinney's N. Y. Laws, 1948, Sec. 119). In the latter action the personal representative may recover for damages resulting from the accident up to the time of death.

See *Greco v. S. F. Kresge Co.*, 12 N. E. (2d) 557, affirming 297 N. Y. S. 258; *Holmes v. City*, 54 N. Y. S. (2d) 289, aff'd. 295 N. Y. 615.

II. The right of action is in the personal representative. McKinney's N. Y. Laws, 1948, Secs. 130, supra, and 119.

III. The loss of support by the deceased is recoverable as an important element of the damages suffered by the spouse and next of kin. *Dowly v. State*, 68 N. Y. S. (2d) 573; *Holmes v. City, supra.*

The personal representative on behalf of the estate may recover in an action under Section 119 for damages to decedent's property prior to his death, but not under the wrongful death statute. *Daily v. Utilities*, 21 N. Y. S. 52; *Reilly v. Railroad*, 71 N. Y. S. 551.

In the action under Section 119 the personal representative may recover for the medical and hospital expenses incurred. *Holmes v. City, supra.* Where the spouse or next of kin pays these expenses, they are recoverable, along with funeral expenses, in the wrongful death action. *Slater v. State*, 82 N. Y. S. (2d) 313; *Dibble v. Whipple*, 22 N. E. (2d) 358. Apparently such expenses are recoverable in the wrongful death action by the personal representative of a deceased married woman, in the absence of a showing that the wife paid or bound her separate estate to pay for the same. See *Grosso v. State*, 31 N. Y. S. (2d) 398, aff'd. 43 N. E. (2d) 530.

Damages for the conscious pain and suffering of the decedent are recoverable in the action under Section 114, though not so in a wrongful death action. *Dowly v. State, supra; Tabor v. State*, 62 N. Y. S. (2d) 380.

Where the loss of services of one's spouse amounts to a pecuniary loss, it is an element of damage recoverable in a wrongful death action. *The Linseed King*, 48 Fed. (2d) 311, aff'd. 52 Fed. (2d) 129.

IV. Wrongful death of a minor.

Statute: No special statutory provision.

The loss of a child's services is an element of damage in a wrongful death action. The amount of recovery includes not only the pecuniary value of his services up to his majority, but also such sum as the parents had reasonable expectation of receiving after the child reached his majority. *Sutherland v. State*, 68 N. Y. S. (2d) 553.

V. The statute of limitations for actions on behalf of the estate under Section 119, may be two or three years depending upon the type of tort involved. Civil Practice Act, Secs. 45 and 51. The statute of limitations for wrongful death actions is two years from death. McKinney's N. Y. Laws, 1948, Sec. 130, supra. The expiration of the latter statute does not affect actions under Section 119.

VI. The amount recoverable in wrongful death actions is not limited by statute.

The State Constitution prevents such limitation. N. Y. Const. Art. 1, Sec. 16; *Sutherland v. State, supra.*

VII. The right of action for wrongful death does not abate, because of the death of the wrongdoer. McKinney's N. Y. Laws, 1948, Sec. 118; *Assurance Co. v. Morgan*, 33 Fed. Supp. 190.

NORTH CAROLINA

I. (A) Statutory provision.

"When the death of a person is caused by a wrongful act, neglect or default of another such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in cases of intestacy." North Carolina General Statutes, Sec. 24-173.

(B) Construction and interpretation.

See *Davenport v. Patrick*, 44 S. E. (2d) 203; *Hoke v. Greyhound Corp.*, 38 S. E. (2d) 105; *Poe v. Railroad*, 54 S. E. 406.

II. Only the personal representative of a deceased can maintain an action for damages for wrongful death. G. S., Sec. 28-173, *supra; Hanes v. Public Utilities Co.*, 131 S. E. 402.

III. Damages are limited to fair and just compensation for the pecuniary injury resulting from death, recoverable by the personal representative for the benefit of the next of kin. *Hoke v. Greyhound Corp.*, supra. The measure of damages is the present value of the accumulation of income

which would have been derived from the person's own exertions, after deducting the probable cost of his own living, and other expenses, based upon the person's life expectancy. *Rea v. Simowitz,* 38 S. E. (2d) 194.

In a single action the personal representative may recover for both consequential damages sustained by deceased from date of injury until death (such as property damages, medical expenses and suffering), and for the pecuniary loss resulting from death. Such damages are to be determined upon separate issues; the recovery for lifetime injuries becomes an asset of the estate, whereas the recovery for wrongful death is for the benefit of the next of kin. *Hoke v. Greyhound Corp., supra.*

The statute (G. S., 28-173, supra) provides for the payment of burial expenses out of the amount recovered in such action.

Where the surviving spouse or parent has paid the medical and hospital expenses, the personal representative probably cannot include such expenses in his cause of action. *McDaniel v. Trent Mills,* 148 S. E. 440; *Helmstetler v. Power Co.,* 32 S. E. (2d) 611. Where the deceased is a married woman, recovery for these expenses is only allowed upon a showing that the wife paid or bound her separate estate to pay the same. *Hawkins v. Mauney,* 211 N. C. 467; *Bowen v. Daugherty,* 168 N. C. 242.

The personal representative can probably include in the measure of damages the value of a wife's household duties and labor. A husband has no separate cause of action to recover for loss of his wife's services, loss of consortium or mental anguish. *Helmstetler v. Power Co., supra.*

The personal representative cannot recover for "loss of companionship." *Helmstetler v. Power Co., supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

The administrator cannot recover value of services of a deceased child to its parents. *Byrd v. Express Co.,* 51 S. E. 851. The measure of damages for death of a child is the same as for death of an adult. *Rea v. Simowitz, supra; Russell v. Steamboat Co.,* 36 S. E. 191.

V. Statute of limitations is one year after death. G. S., Sec. 28-173, supra. It would appear that damages to the decedent's estate as such are recoverable after the statute has run. See *Hoke v. Greyhound, supra;* G. S., Secs. 28-172 and 28-175; also, *Suskin v. Trust Co.,* 199 S. E. 276.

VI. There is no statutory limitation of the amount recoverable.

VII. An action for wrongful death is not abated by death of the wrongdoer. G. S., Secs. 28-173, supra, 28-174, and 1-74; *Tonkins v. Cooper,* 122 S. E. 294.

NORTH DAKOTA

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." North Dakota Revised Code, 1943, Sec. 32-2101.

(B) Construction and interpretation.

See *Satterberg v. Railway,* 121 N. W. 70; *Stejskal v. Darrow,* 215 N. W. 82.

II. The action may be brought by the following persons in the order named: (1) Surviving spouse, (2) children, (3) parents and, (4) personal representative. If the action is not commenced by first person entitled to sue in thirty days, then the next person named may sue, each having thirty days before the next may sue. N. D. R. C., 1943, Sec. 32-2103.

III. In an action brought under the wrongful death statute, "the jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery." N. D. R. C., 1943, Sec. 32-2102.

The statute has been construed to allow recovery for loss of support, property damage to decedent's estate and medical, hospital, and funeral expenses. *Stejeskal v. Darrow, supra.*

Damages for pain and suffering are not allowed. *Hassa v. Railway,* 77 N. W. 97.

The beneficiary in his action may include a claim for value of services of a wife to surviving husband, or vice versa, provided such value is proved to be pecuniary. N. D. R. C., 1943; Sec. 32-2103; *Satterberg v. Railway,* 121 N. W. 70.

Damages for "loss of companionship" are not recoverable. *Kalson v. Grob,* 237 N. W. 848; *Stejskal v. Darrow, supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

The parent may recover for loss of services of a deceased child. N. D. R. C., 1943, Sec. 32-2103; *Schultz v. Winston Newell,* 283 N. W. 69.

V. Statute of limitations is two years from death. N. D. R. C., 1943, Sec. 28-0118.

VI. There is no statutory limitation of amount recoverable for wrongful death.

VII. The action does not abate upon death of the wrongdoer. S. B. 87, Laws 1949 (effective July 1, 1949).

OHIO

I. (A) Statutory provision.

"When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances which make it in law murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person. * * *" Ohio General Code, 1932, Sec. 10509-166.

(B) Construction and interpretation.

Ohio allows both the personal injury survivor action and a concurrent wrongful death action arising from the same negligence; although prosecuted by the same personal representative, they are not considered merged; hence judgment in one is not a bar to recovery in the other. *May Coal Co. v. Robinette,* 165 N. E. 576; *Phillips v. Traction Co.,* 189 N. E. 444.

The Ohio Court has taken the view that the circumstances of the accident or injury determine the wrongful death action right, and subsequent acts of the deceased cannot bar such right. *Maguire v. Traction Co.,* 140 C. C. (N. S.) 431, aff'd. 102 N. E. 1121.

II. The right of action is in the personal representative. G. C., 1932, Sec. 10509-167.

III. The action is to recover for the "pecuniary injury resulting from such death" to the enumerated beneficiaries. G. C., 1932, Sec. 10509-167.

A presumption of "pecuniary injury" arises ordinarily in favor of those persons legally entitled to services, earnings, or support from the decedent. Collateral kin who have no legal claims on the decedent must prove "pecuniary injury." *Karr v. Sixt,* 67 N. E. (2d) 331.

Property damage is not recoverable in the action under the wrongful death statute. *Munn v. Herrif,* 10 Ohio Opinions 208. Medical and hospital expenses are not recoverable. *Gaus v. Railroad,* 10 N. E. (2d) 635; *Sprung v. E. I. duPont Co.,* 16 Ohio Opinions 36. Funeral expenses if paid by the beneficiary are recoverable. *Albers v. Transportation Co.,* 28 Ohio Opinions 287, aff'd. 60 N. E. (2d) 669.

Damages for pain and suffering are not recoverable under the death statute. *Russell v. Sunberry,* 41 Am. Rep. 523. The same holds true with respect to the beneficiaries bereavement or mental pain and suffering. *Karr v. Sixt,* 67 N. E. (2d) 331.

The pecuniary value of the loss of a wife's services to the surviving husband is recoverable under the wrongful death statute. *Davis v. Guernieri,* 15 N. E. 350.

"Loss of companionship" is not an element of damage. *Kennedy v. Byers,* 140 N. E. 630; *Allemeier v. St. Ry. Co.,* 40 N. P. 655, aff'd. 53 N. E. 300.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The cases allow recovery for the loss of services of a minor child even though the child's age makes it impossible to show that he had an earning power, or just what earning power he might achieve in the future. *Cincinnati St. R. R. Co. v. Altemeier,* 53 N. E. 300.

V. Statute of limitations is two years from death. G. C., 1932, Sec. 10509-167.

VI. The Ohio Constitution (Art I, Sec. 19a) precludes any statutory limitation of damages for wrongful death.

VII. The action does not abate upon death of the wrongdoer. G. C., 1932, Sec. 10509-166.

OKLAHOMA

I. (A) Statutory provision.

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might

have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased." 12 Okl. Stat., 1947 Sup., Sec. 1053.

(B) Construction and interpretation.

See *Potter v. Oil Co.*, 78 P. (2d) 694; *Mo., Kans. & Texas R. Co. v. Canada*, 265 P. 1045, 59 A. L. R. 743; *Okmulgee Gas Co. v. Kelly*, 232 P. 428.

II. The personal representative must bring the action if one has been appointed and the deceased is an Oklahoma resident. 12 Okla. Stat., 1947 Sup., Sec. 1053, supra; 12 Okla. Stat., 1941, Sec. 1054. If no personal representative has been appointed or the deceased is a non-resident, the surviving widow may bring the action, or if there be no surviving widow, the next of kin may join to maintain a suit. 12 Okl. Stat., 1941, Sec. 1054; Mo. *Kans. & Texas R. Co. v. Canada, supra.*

III. The pecuniary loss suffered by the surviving spouse and children or next of kin is recoverable. *Hurley v. Hurley*, 127 P. (2d) 147.

The personal representative may recover for property damage to the decedent's estate. *Baltimore American Ins. Co., v. Cannon*, 73 P. (2d) 167. He may also include a claim for damages based on medical, hospital and funeral expenses. *Thompson v. Cooper*, 135 P. (2d) 49. .

The personal representative may also bring an action for the benefit of the estate of the deceased for the deceased's pain and suffering. *S. H. Kress & Co. v. Nash*, 83 P. (2d) 536.

In his wrongful death action the personal representative has authority to recover the value of the services of a wife to the surviving spouse, or vice versa, provided such value is proved pecuniary. *Okmulgee Gas Co. v. Kelly, supra.*

Damages for "loss of companionship" are not allowed. *Mo., Okla. & Gulf Ry. Co. v. Lee*, 175 P. 367.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The value of services of a deceased child to his parents during minority is recoverable. *Lakeview, Inc. v. Davidson*, 26 P. (2d) 760. The pecuniary value of such services or aid which the decedent might have rendered after obtaining his majority as well as the sums of money the decedent might have constributed to his parents is also recoverable. *Kaw Bailer Works v. Frymyer*, 227 P. 453.

V. Statute of limitations is two years. 12 Okl. Stat., 1947 Sup., Sec. 1053, supra. The personal representative will never be authorized to sue for damages to the decedent's estate, such as property damage and pain and suffering, after the cause of action for wrongful death has expired, because the period of limitation on the action brought for the benefit of the estate is also two years. 12 Okl. Stat., 1941, Sec. 95.

VI. There is no statutory limitation on the amount recoverable, and the Oklahoma Constitution (Art. 23, Sec. 7) prevents any statutory limitation.

VII. The death action is not abated by death of the wrongdoer. 12 Okl. Stat., 1947 Sup., Sec. 1053, supra.

OREGON

I. (A) Statutory provisions.

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000." Oregon Compiled Laws Annotated, Sec. 8-903.

"Causes of action arising out of injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person; and provided further, that the damages recoverable under the provisions of

this act shall not exceed $10,000." O. C. L. A., Sec. 8-904.

(B) Construction and interpretation.

See *Ross v. Robinson,* 124 P. (2d) 918; *Perham v. Elecrtic Co.,* 53 P. 14.

II. The right of action is in the personal representative. O. C. L. A., Secs. 8-903 and 8-904, supra.

III. The measure of damage is the pecuniary loss suffered by the estate, without any solatium for grief and anguish of surviving relatives or pain and suffering of the deceased, and that loss is what the deceased would have probably earned by his intellectual or bodily labor. *Scott v. Brogan,* 73 P. (2d) 688; *Gabrielson v. Dixon,* 291 P. 494.

Funeral expenses may be recovered under the Oregon death statute where any of the persons for whose benefit the action is brought is legally bound to pay them. Medical expenses incurred prior to the accrual of the cause of action for wrongful death, that is, before the decedent's death, cannot be recovered in the action under the wrongful death statute but may be recovered in an independent action by the parties obligated to pay such expenses. *Hansen v. Hayes,* 154 P. (2d) 204.

A surviving wife has no cause of action for loss of her husband's consortium. *Kosciolek v. Ry., L. & P. Co.,* 160 P. 132; *Sheard v. Railway,* 2 P. (2d) 916. A husband may recover damages for loss of services and companionship but only from the date of injury to the time of the wife's death. Such recovery is not under the death statute but is recovered in an independent action brought by the husband. *Elling v. Blake-McFall Co.,* 166 P. 57.

IV. Wrongful death of minor.

Statute: O. C. L. A., Sec. 1-307.

A father, or in the case of his death or desertion from the family, the mother may sue for the "injury or death" of a child. O. C. L. A., Sec. 1-307. See *Schleiger v. Terminal Co.,* 72 P. 324, as to whether Sec tion 1-307 precludes an action by the personal representative under Section 8-903, supra.

A father has the right to sue for loss of services of his minor child. The right does not exist, however, after the child has attained his majority. *Schmit v. Day,* 39 P. 870.

V. Statute of limitations is two years from death. O. C. L. A., Secs. 8-903, supra, and 1-206.

VI. The amount recoverable is limited to $10,000.00. O. C. L. A., Secs. 8-903 and 8-904, both *supra.*

VII. The action does not abate upon death of the wrongdoer. O. C. L. A., Secs. 1-312 and 1-313.

PENNSYLVANIA

I. (A) Statutory provisions.

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned." 12 Penn. Statutes, Sec. 1601.

(B) Construction and interpretation.

When a person has been injured and thereafter dies, it is possible that one or more of the following actions may be brought: (1) A true action for wrongful death under 12 P. S., Secs. 1601, supra, 1602, 1603, 1604. This action may be brought only if a spouse, child or parent survives and if no suit was brought by the deceased in his lifetime. Damages recovered are for the pecuniary loss suffered by the spouse, child or parent; (2) An action brought by the personal representative of the decedent under 12 P. S., Sec. 1602. This action may be brought only if no spouse, parent or child survives and probably only if the decedent commenced no action in his lifetime. The damages recoverable are limited to medical, hospital, funeral and administration expenses; (3) An action for personal injuries begun by the injured in his lifetime and continued after his death by his personal representative under Sec. 35 (a) of the Fiduciaries Act (20 P. S., Sec. 711). The damages recoverable are the same as if the decedent had lived to prosecute the action to conclusion; and (4) An action for personal injuries begun by the personal representative after the decedent's death by virtue of Sec. 35 (b) of the Fiduciaries Act. (20 P. S., Sec. 711). This is a normal survival statute.

II. The action must be brought by the personal representative if brought within six months after death; after six months the action may be brought by the surviving spouse, parent or child. Rule of Civil Proc. 2204.

III. Recovery may be had for the pecuniary loss which the beneficiaries suffer

by reason of the fact that they will not receive future contributions which they could reasonably expect to have received from the descedent had he lived. *Krosowski v. White Star Lines,* 162 A. 200; *Siidekum v. Rescue League,* 45 A. (2d) 59.

Property damage is recoverable under Sections 35 (a) and (b) of the Fiduciaries Act. See I (B), supra.

In a wrongful death action funeral expenses are recoverable by the spouse, parent or child only if they have paid or become liable to pay for the same. Doubt as to hospital expenses, if not paid. *Regan v. Davis,* 138 A. 751.

Damages for pain and suffering are recoverable by the personal representative in an action under the Fiduciaries Act, but not recoverable in wrongful death actions. *Pezzulli v. D'Ambrosia,* 26 A. (2d) 659.

The personal representative has authority to include in his action value of services of a wife to surviving husband, or vice versa, providing such value is proved pecuniary. *Siidekum v. Rescue League, supra.*

"Loss of Companionship" is not an element of damage. *Caldwell v. Brown,* 53 Pa. 453.

IV. Wrongful death of minor.

Statute: No special statutory provision.

An administrator has authority to recover in an action for wrongful death the value of services of a deceased child to his parent during minority and beyond. *Vincent v. Philadelphia,* 35 A. (2d) 65.

V. The statute of limitations for wrongful death actions is one year from death. 12 P. S., Sec. 1603. The fact that the one year statute has run does not affect actions under the Fiduciaries Act. *Stegner v. Fenton,* 40 A. (2d) 473.

VI. The State Constitution prevents the enactment of a statutory limitation of the amount recoverable.

VII. The State Constitution prevents abatement of the cause of action by death of the wrongdoer.

RHODE ISLAND

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. * * *" General Laws of Rhode Island, Chap. 477, Sec. 1, as amended by Chapter 2332 of the Public Laws (1949).

(B) Construction and interpretation.

See *Carpenter v. Rhode Island Co.,* 90 A. 768; *Carrigan v. Cole,* 85 A. 934; *McCabe v. Lighting Co.,* 61 A. 667.

II. The right of action is in the personal representative; if none, or he fails to sue in six months, then the beneficiaries may bring the action. G. L., Chap. 477, Sec. 1, as amended.

III. Surviving child is not permitted to show special damages such as loss of parental care of deceased father, since right of action inures to benefit of decedent's estate and all children share equally as beneficiaries thereof. *McCabe v. Lighting Co., sunpra.*

The remedy provided in the statute is exclusive, and a separate action cannot be brought to recover expense arising from injuries to the deceased. *Lubrano v. Atl. Mills,* 32 A. 205, the nature of the expenses, whether for property damage, medical expenses or funeral expenses, is immaterial.

Medical, hospital and funeral expenses are not included as such in the damages recoverable. *McCabe v. Lighting Co.,* supra; *Dimitri v. Cienci & Son,* 103 A. 1029 The pain and suffering of the deceased cannot be properly considered in determining damages. *Lubrano v. Atl. Mills, supra; McCabe v. Lighting Co., supra.*

The statute has been construed to allow a husband to recover for the death of his wife who was not engaged in an income producing occupation, and the usual measure of damages applies, namely, the pecuniary value of the decedent's services as house-wife. *Burns v. Brightman,* 117 A. 26.

Damages for "loss of companionship" are not recoverable. *McCabe v. Lighting Co., supra; Burns v. Brightman, supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

Where the decedent is a minor, the recovery is, as in other cases, for damages to the decedent's estate, and therefore in computing those damages the earnings of the child prior to his emancipation are not to be considered. Prospective earnings, decreased by expenses and reduced to present

value, is the measure of damages. *Dimitri v. Cienci & Son, supra; Zannelli v. Pettine,* 155 A. 236.

V. Statute of limitations is two years from death. G. L., Chap. 477, Sec. 1, as amended.

VI. The statute does not set a maximum as to the amount recoverable for wrongful death, but does set a minimum of $2,500.00. G. L., Chap. 477, Sec. 1, as amended.

VII. The action for wrongful death is not abated by death of the wrongdoer. G. L., Chap. 477, Sec. 1, as amended.

SOUTH CAROLINA

I. (A) Statutory provisions.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. S. C. Code of Civil Pro., 1942, Sec. 411.

"Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding." South Carolina Code of Civil Procedure, 1942, Sec. 419.

(B) Construction and interpretation.

See *Rookard v. Railway,* 71 S. E. 992; *Mishoe v. Railroad,* 197 S. E. 97.

II. The right of action is in the personal representative. S. C. C. C. P., 1942, Sec. 412.

III. Under the wrongful death statute loss of support to beneficiaries may be proved as an element of damage, but proof of actual pecuniary loss is not essential to recovery.

Damages sustained by the decedent's estate, such as property damage and medical and hospital expenses incurred by the decedent as a result of the accident, are recoverable under the survival statute (Sec. 419, supra), rather than the death statute. It has been held, however, that funeral expenses are recoverable in the wrongful death action if paid by the personal representative. *Petrie v. Railroad,* 7 S. E. 515;

Damages for the decedent's pain and suffering are recoverable in the action under the survival statute.

"Loss of companionship" is element of damage in the action under the wrongful death statute.

IV. Wrongful death of minor.

Statute: No special statutory provision.

It would appear that damages for loss of services of a deceased child are recoverable in the wrongful death action.

V. Statute of Limitations is six years which agrees with normal statute of limitations in South Carolina. S. C. C. C. P., 1942, Sec. 413.

VI. There is no statutory limitation of the amount recoverable for wrongful death.

VII. The death of the wrongdoer does abate an action for wrongful death. *Clausses v. Brothers,* 145 S. E. 539.

SOUTH DAKOTA

I. (A) Statutory provision.

"Whenever the death *or injury* of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if death had not ensued, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony; and when the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person.

"Actions for wrongful death or personal injury shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death or injury of the injured person." Chapter 172, Laws of 1947 of South Dakota; South Dakota Code, Sec. 37.2201.

(B) Construction and interpretation.

The South Dakota wrongful death statute was amended in 1947. The amended version is given. Prior to the amendment, the words "or injury" had not been a part of the statute nor had the last paragraph. The amendment was evidently enacted to provide for a survival in the cases indicated; it being held by the Supreme Court prior to the amendment that there was no survival under the former statute.

There have been no cases passing upon the amended statute.

II. The personal representative has the exclusive right of action in wrongful death cases. Chap. 173, Laws of S. D., 1947; S. D. C., Sec. 37.2203.

III. Prior to the 1947 amendment (see I (B), supra) the statute provided for recovery for "pecuniary" injury. The statute in its amended form substitutes the word "all." S. D. C., Sec. 37-2203. Before the amendment it was held that the plaintiff must prove a pecuniary loss. *Hodkinson v. Parker,* 16 N. W. (2d) 924. Farther, the South Dakota Supreme Court would not allow damages for the deceased's pain and suffering or for "loss of companionship." *Tufty v. Transit Co.,* 10 N. W. (2d) 767.

Under the former statute the court has held that there is no action to recover damages sustained by the decedent's estate as distinguished from the next of kin. *Kerr v. Basham,* 252 N. W. 853. Medical, hospital and funeral expenses must necessarily have been paid by the beneficiaries or there could be no damage to them. *Hodkinson v. Parker, supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

Where the deceased was a minor child, the Supreme Court held under the prior statute that the parents were presumed to suffer a pecuniary loss between the time of death and age of majority and to that extent the probability of future benefits to parents might be inferred by the jury, but as to an adult child there was no such presumption and the plaintiff had the burden of proving the probability of loss. *Hodkinson v. Parker, supra.*

V. Statute of limitations is three years from death. S. D. C., Sec. 37.2203.

VI. The amount recoverable in a wrongful death action is limited to $10,000.00. S. D. C., Sec. 37.2203.

VII. The action does not abate upon death of the wrongdoer. S. D. C., Sec. 37.220, supra.

TENNESSEE

I. (A) Statutory provision.

"The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors.

"The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his or her legally adoptive parents or parent when and where his or her natural parents or parent or next of kin are unknown, or to the administrator for the use and benefit of the said adoptive parents or parent." William's Tennessee Code, 1934, Sec. 8236.

(B) Construction and interpretation.

See *East Tenn. V. & G. R. Co., v. Lilly,* 18 S. W. 243; *Elliott v. Felton,* 119 Fed. 270; *Stuber v. Railroad,* 87 S. W. 411.

II. The right to bring the action in case of wrongful death of an adult is in either the surviving spouse, children, next of kin or personal representative, but the spouse's right of action is prior and superior. William's T. C., 1934, Secs. 8237 and 8239; *Koontz v. Fleming,* 65 S. W. (2d) 821.

III. The measure of damages in an action for wrongful death is set forth in William's T. C., 1934, Sec. 8240. The elements specified are: (1) "The mental and physical suffering," (2) "Loss of time," (3) "Necessary expenses resulting to the deceased from the personal injuries", and (4) "Also the damages resulting to the parties for whose use and benefit the right of action survives."

Recovery is authorized for loss of support to next of kin dependent upon the deceased. *Davidson-Benedict Co. v. Severson,* 72 S. W. 967; *Stuber v. Railroad,* 87 S. W. 411.

Recovery may be had for property damages to decedent's estate and for medical and hospital expenses incurred as a result

of the accident. *Davidson-Benedict Co. v. Severson, supra.* Funeral expenses are likewise recoverable. *Landrum v. Callaway,* 12 Tenn. App. 150. It would appear that medical, hospital and funeral expenses are recoverable in the same action no matter by whom paid. Medical and hospital expenses are not recoverable by the personal representative of a deceased married woman in the absence of a showing that the woman paid or bound her separate estate to pay the same since the husband is primarily liable for such expenses and they are recoverable by him. *Simpson v. Drake,* 262 S. W. 41.

"Loss of companionship," at least that of a deceased husband and father, is apparently an element of damages in light of the more recent decisions, though prior decisions are contra. *Landrum v. Callaway,* (1930), supra.

Loss of services of a deceased wife to the surviving husband, or vice versa, is a recoverable element of damages. *Davidson-Benedict Co. v. Severson, supra; Garret v. Railroad,* 197 Fed. 715, aff'd. 35 S. Ct. 32, 235 U. S. 308.

IV. Wrongful death of minor.

Statute: No special statutory provision.

Since the enactment of the Code of 1932 the administrator, the legal father or mother in his or her name, or next of kin may institute suit. *Cummings v. Woody,* 152 S. W. (2d) 246.

Value of services of a deceased child to his parent or parents during minority and beyond is recoverable. *Tenn. C. I. & R. Co. v. Watts,* 1 Tenn. Civ. App. 347; *Chess-Wymond Co. v. Davis,* 4 Tenn. Civ. App. 152.

V. Statute of limitations is one year. The court holds that Section 8595 (Williams T. C., 1934, Sec. 8594), referring to limitations for personal injuries, applies. *Wilson v. Massengill,* 124 Fed. (2d) 666.

VI. There is no statutory limitation on the amount recoverable for wrongful death.

VII. The action is not abated by death of the wrongdoer. Williams T. C., 1934, Sec. 82431.

TEXAS

I. (A) Statutory provision.

"* * * An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases: 1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of another person, association of persons, joint stock company, corporation or trustee or receiver of any person, corporation, joint stock company, or association of persons, his, its or their agents or servants, such persons, association of persons, joint stock company, corporation, trustee or receiver, shall be liable in damages for the injuries causing such death. * * *" Vernon's Revised Civil Statutes, 1925, Art. 4671.

(B) Construction and interpretation.

Texas has a survival statute as well as a wrongful death statute. R. C. S., 1925, Art. 5525.

See *Farmers & Merchants Nat. Bank v. Hanks,* 137 S. W. 1120; *Galveston, etc., Ry. Co. v. Cook,* 16 S. W. 1038.

II. The right of action is in the surviving spouse, children, and parents. If none of them commence the action within three months after the death the personal representative prosecutes the action unless requested by all of the beneficiaries to not do so. R. C. S., 1925, Art. 4675.

III. Damages for loss of support to next of kin dependent upon the deceased may be awarded under the wrongful death statute. The proper measure of damages is the present worth of the value of the pecuniary aid that plaintiff had a reasonable expectation that the deceased would have contributed had he lived. *International-Great Northern Ry. Co. v. Acker,* 128 S. W. (2d) 506; *Motor Transport Co. v. Blair,* 136 S. W. (2d) 656.

Under the wrongful death statute the plaintiff may recover for property damage, medical and hospital expenses, incurred by the deceased as a result of the accident, and funeral expenses incurred. *International-Great Northern Ry. Co. v. Acker, supra; Jenney v. Jackson,* 46 S. W. (2d) 418. Where such expenses are paid by husband, wife or parent they may be included in the claim. *Hines v. Richardson,* 232 S. W. 889; *Smith v. Farrington,* 6 S. W. (2d) 736.

Damages for pain and suffering of the deceased are recoverable under the survival statute but not under the wrongful death statute. *March v. Walker,* 48 Tex. 372; *Jenney v. Jackson, supra.*

The surviving husband or wife may recover for loss of services of the deceased spouse. *Tex. & Pac. Ry. Co., v. Gillette,* 50 S. W. (2d) 901; *T. & N. O. Ry. Co. v. Glass,* 201 S. W. 730. The surviving spouse cannot recover for "loss of companionship."

Tex. & Pac. Ry. Co. v. Gillette, supra. A wife may recover, however, for the value of her husband's attention, care and counsel. *Houston & T. C. Ry. Co. v. Davenport,* 102 Tex. 369. So, too, the husband may recover for the wife's comfort, assistance and society. *H. & W. Ry. Co. v. Lacy,* 24 S. W. 269.

IV. Wrongful death of minor.

Statute: No special statutory provision.

Beneficiaries named in the statute may recover the value of services of a deceased child to his parent during minority and beyond. *Cantu v. Railway,* 166 S. W. (2d) 963; *Francis v. Railroad,* 253 S. W. 819.

V. Statute of limitations is two years after the cause of action accrues. R. C. S., 1925, Art. 5526. Where the children of the decedent are minors, however, suit need not be brought within two years because such cause is a property right and the limitation does not run against minors. R. C. S., 1925, Art. 5535; *Texas Utilities Co. v. West,* 59 S. W. (2d) 459.

VI. There is no statutory limitation on the amount recoverable.

VII. A wrongful death action is not abated by death of the wrongdoer. R. C. S., 1925, Art. 4676.

UTAH

I. (A) Statutory provision.

"Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just." Utah Code Annotated, 1943, Sec. 104-3-11.

(B) Construction and interpretation.

The only survival statutes in Utah in favor of or against deceased's estate are U. C. A., 1943, Secs. 102-11-6 and 102-11-7, which have been construed to permit suits involving damage to personal property.

The cause of action for personal injuries vested in the injured person is extinguished upon his death, and the wrongful death statutes create a new cause of action in favor of the heirs. *Halling v.* Commission, 263 P. 78; *Morrison v. Perry,* 140 P. (2d) 772.

II. The right of action, where the deceased is an adult, is in the heirs or personal representative. U. C. A., 1943, Sec. 104-3-11, *supra; Plaza v. Smelting Co.,* 213 P. 187.

III. Loss of support and loss of association, society and affection measured by a pecuniary standard are recoverable. *Evans v. Railroad,* 108 P. 638. Funeral expenses, if the decedent's estate is insolvent and the heirs have been required to personally pay such expenses, are likewise recoverable. Funeral expenses not so paid, and medical and hospital expenses are not recoverable since the only cause of action vested in the heirs under the wrongful death statute is one for damages sustained by the heirs. *Morrison v. Perry.* These expenses are apparently not recoverable under the survival statutes either. See I (B), supra.

Pain and suffering is not an element of damage. *Webb v. Railway,* 24 P. 616. A surviving wife may recover for loss of services of a deceased husband, and the decisions seem broad enough to permit recovery in the reverse situation. *Burbidge v. Traction Co.,* 196 P. 556; *Rogers v. Railroad,* 90 P. 1075.

IV. Wrongful death of minor.

Statute: U. C. A., 1943, Sec. 104-3-10.

The right of action is in the father, or in case of his death or desertion from the family, in the mother. U. C. A., 1943, Sec. 104-3-10.

The value of services of a deceased minor to his parents during minority and beyond is recoverable. *Beaman v. Mining Co.,* 63 P. 631; *Van Cleave v. Lynch,* 116 P. (2d) 244.

V. Statute of limitations is two years. Utah Statutes, 19333, 104-2-25. Actions to recover for property damage may be brought under the survival statutes after the two year period.

VI. There is no statutory limitation on the amount recoverable in a wrongful death action.

VII. The wrongdoer's death abates the action in so far as the cause of action for

personal injuries to the deceased and damage incidental thereto, such as hospital and medical expense, is concerned. See *Morrison v. Perry, supra.*

VERMONT

I. (A) Statutory provision.

"Where the death of a person is caused by the wrongful act, neglect or default of a person or corporation, and the act, neglect or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the person or corporation liable to such action shall be liable to an action for damages, notwithstanding the death of the person injured and although the death is caused under such circumstances as amount in law to a felony." Vermont Statutes, 1947, Sec. 2926.

(B) Construction and interpretation.

Where death occurs in consequence of a bodily injury the personal representative has two causes of action. *Needham v. Railroad,* 38 Vt. 294; *Ranney, Adm'r. v. St. J. & L. C. Rd., Co.,* 24 A. 1053. He has one cause of action under Sec. 2926, supra, on behalf of the next of kin or spouse, and a second cause of action on behalf of the estate under Sec. 2920, et seq. (survival statutes). *Legg Jr., Adm'r. v. Britton,* 24 A. (2d) 1016.

See *Brown, Adm'r. v. Perry,* 150 A. 910; *Abbott v. Abbott,* 28 A. (2d) 375; *Desautels' Adm'r. v. Mercure's Estate,* 158 A. 682.

II. The right of action is in the personal representative. V. S., 1947, Sec. 2927.

III. Damages recoverable under the wrongful death statute are limited to the pecuniary loss or injury to the next of kin or spouse. *Butterfield v. Power Co.,* 49 A. (2d) 415; *D'Angelo, Adm'r. v. Power Co.,* 135 A. 598. The loss of support by the deceased is an element of the damage suffered by the next of kin. *L. S. Lazelle, Adm'r. v. Town,* 41 A. 511.

Property damage to decedent's estate is recoverable under the provisions of the survival statute. V. S., 1947, Sec. 2921; *Legg Jr., Adm'r. v. Britton, supra.* The conscious pain and suffering of the deceased is also an element of damage to be recovered under the survival statute and not the wrongful death statute. *Ranney, Adm'r. v. St. J. & L. C. Rd. Co., supra.*

Medical and hospital expenses resulting from the accident are recoverable under the wrongful death statute when such expenses are paid by the surviving next of kin. *Trow v. Thomas,* 41 A. 652. Where these expenses are paid by the deceased or his estate they may be recovered under the survival statute. V. S., 1947, 2922; *Bradly, Adm'r., v. Andrews,* 51 Vt. 524. Funeral expenses are not recoverable under the survival statute since they did not arise until after the death and consequently created no claim in the decedent's lifetime which might survive him. Furthermore, such expenses are not recoverable in the wrongful death action. *Trow v. Thomas, supra.*

A wrongful death action does not allow for damages by way of solatium. *Lazelle, Adm'r. v. Town, supra.*

IV. Wrongful death of minor.

Statute: No special statutory provision.

The loss of a child's services is an element of damage in a wrongful death action. The amount of recovery includes the pecuniary value of such services up to majority, and also such sum as the parents had reasonable expectation of receiving thereafter. *Butterfield v. Power Co., supra.*

V. Statute of limitations is two years for wrongful death actions. V. S., 1947, Sec. 2927. Actions on behalf of the estate may be brought afterwards. ***Reed v. Rosenfield.*** 51 A. (2d) 189; *Abbott v. Abbott, supra.*

VI. There is no statutory limitation of the amount recoverable.

VII. The right of action for wrongful death does not abate because of death of the wrongdoer. V. S., 1947, Sec. 2930.

VIRGINIA

I. (A) Statutory provision.

"Whenever the death of any person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem against said ship or vessel, or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the

death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured party.

"Every action under this section shall be brought within one year after the death of the injured party, notwithstanding the provisions of section fifty-eight hundred and eighteen." Michie's Code of Virginia, 1942, Chap. 236, Sec. 5786.

(B) Construction and interpretation.

See *Anderson v. Hotel Co.*, 24 S. E. 269; *Atlantic Greyhound Lines v. Keesee*, 111 Fed. (2d) 657; *Keister v. Keister*, 96 S. E. 315; *Street v. Mining Corp.*, 39 S. E. (2d) 27.

II. The right of action is in the personal representative. Michie's V. C., 1942, Chap. 236, Sec. 5786.

III. Damages may be exemplary, or punitive or as a solatium. *Harris v. Royer*, 182 S. E. 276.

In an action under Section 5786, supra, property damage sustained by the decedent's estate cannot be shown, unless in the nature of medical, hospital and funeral expenses paid by one of the surviving relatives, in which case it may be shown for the purpose of aiding the jury in apportioning the damages between the surviving relatives.

Evidence of the deceased's pain and suffering is inadmissible in the wrongful death action.

The trial court will exclude evidence of the deceased's or the beneficiaries' pecuniary condition for the purpose of proving the defendant's liability or the quantum of damages. Such evidence is apparently admissible on the question of apportionment of damages. In such case the defendant is entitled to a precautionary instruction, or the trial court may postpone the admitting of such evidence until the jury has arrived at its verdict and decided the question of liability and extent of damages. *Crawford v. Hite*, 10 S. E. (2d) 561.

The pecuniary loss sustained by the beneficiaries in a sum equal to the probable earnings of the deceased is recoverable in a wrongful death action. *Ratcliffe v. McDonald*, 97 S. E. 307.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The personal representative may recover for the pecuniary loss sustained by the parents, brothers and sisters of a deceased child, in sum equal to the probable earnings of the child, and also for the loss of care, attention and society as well as for the sorrow, suffering and mental anguish occasioned to them by his death. *Ratcliffe v. McDonald, supra.*

V. Statute of limitations is one year after death. Michie's V. C., 1942, Chap. 236, Sec. 5786, supra. Recovery for property damage, such as to the automobile involved in the accident, is recoverable at any time within five years. See *Street v. Mining Co., supra,* in connection with this problem.

VI. The amount recoverable in a wrongful death action is limited to $15,000.00. Michie's V. C., 1942, Chap. 236, Sec. 5787.

VII. The action does not abate by reason of the death of the wrongdoer. Michie's V. C., 1942, Chap. 236, Sec. 5786, supra.

WASHINGTON

I. (A) Statutory provisions.

"When the death of a person is caused by the wrongful act, neglect or default of another, his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony." Remington's Revised Statutes of Washington, 1932, Vol. 2, Sec. 183.

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in

favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death." Remington's Revised Statutes of Washington, 1932, Vol. 2, Sec. 194.

(B) Construction and interpretation.

See *Brodie v. Power Co.*, 159 P. 791; *Murray v. Garrick & Co.*, 20 P. (2d) 591; *Cook v. Rafferty*, 93 P. (2d) 376.

II. Right of action is in the personal representative. Rem. R. S. W., 1932, Vol. 2, Sec. 183.

III. Damages for loss of support are recoverable since the statute enumerates as beneficiaries wife, husband, child, parents, sister or brother "dependent upon the deceased person for support." Rem. R. S. W., 1932, Vol. 2, Sec. 183-1.

Property damage is recoverable in the action under the death statute if community damage, otherwise not. The same holds true with respect to medical and hospital expenses. *Boyd v. Sibold*, 109 P. (2d) 35. Funeral expenses are recoverable in any event. *Castner v. Gas & Fuel Co.*, 219 P. 12; *McMullen v. Motor Co.*, 25 P. 99. The personal representative may include a claim for the decedent's pain and suffering. *Anelich v. The Arizona*, 49 P. (2d) 3.

The value of services of a wife to surviving husband, or vice versa, may be recovered by the personal representative, provided such value is proved to be pecuniary. *Hinton v. Carmody*, 45 P. (2d) 32; *Hanson v. Mill Co.*, 81 P. (2d) 855. "Loss of companionship" sustained by surviving spouse is recoverable. *Hinton v. Carmody, supra.*

IV. Wrongful death of minor.

Statute: Rem. R. S. W., 1932, Vol. 2, Secs. 181 and 183.

Right of action in the case of a deceased child is in the father, or in the event of his death or desertion, in the mother. Rem. R. S. W., 1932, Vol. 2, Sec. 184.

The value of service of a deceased child to its parents is recoverable. *Skeels v. Davidson*, 139 P. (2d) 301.

V. Statute of limitations is three years. The courts hold the three-year general statute of limitations applicable to wrongful death actions. *Dodson v. Can Co.*, 294 P. 265.

VI. There is no statutory limitation on the amount recoverable in wrongful death actions.

VII. The action is abated by death of the wrongdoer. *Bortle v. Osborn*, 285 P. 425.

WEST VIRGINIA

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrong-doer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrong-doer occurred before or after the death of the injured party." West Virginia Code of 1943, as amended in 1945 and 1947, Chap. 55, Art. 7, Sec. 5.

(B) Construction and interpretation.

See *Perry v. Coal Co.*, 81 S. E. 844; *Searle v. Railroad*, 9 S. E. 248, 32 A. L. R. 1202

II. None other than the personal representative can maintain this statutory action for damages for wrongful death. W. Va. Code, Chap. 55, Art. 7, Sec. 6.

III. Loss of support to next of kin dependent upon deceased may be shown in evidence but is not necessary for recovery. W. Va. Code, Chap. 55, Art. 7, Sec. 6; *Kelley v. Railroad*, 52 S. E. 520, 2 L. R. A. (NS) 898. The law gives unlimited discretion as to the amount of damages to the jury within the limit of $10,000.00. Those closely related to the person killed by a tort have a recovery. *Kelley v. Railroad, supra.* The jury has absolute control over

the question of damages within the limit of $10,000.00. *Turner v. Railroad,* 22 S. E. 83.

Such elements as property damage, medical and hospital expenses, funeral expenses and decedent's pain and suffering may be shown but are not necessary as the jury has an unlimited discretion in assigning damages.

IV. Wrongful death of minor.

Statute: No special statutory provision.

The administrator has authority to recover value of services of a deceased child to his parent during minority but not beyond, but showing of pecuniary or compensatory damages is not necessary. *Legg v. Jones,* 30 S. E. (2d) 36; *Utt v. Herold,* 34 S. E. (2d) 357.

V. Statute of limitations two years from death. W. Va. Code, Chap. 55, Art. 7, Sec. 6.

VI. Amount recoverable for wrongful death is limited to $10,000.00. W. Va. Code, Chap. 55, Art. 7, Sec. 6.

VII. The action survives the death of the wrong-doer and may be enforced against the personal representative. W. Va. Code, Chap. 55, Art. 7, Sec. 8, as amended 1945.

WISCONSIN

I. (A) Statutory provisions.

"Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state." Wisconsin Statutes, Sec. 331.03.

"In addtion to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyance of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate. Actions for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person." Wisconsin Statutes, Sec. 331.01.

(B) Construction and interpretation.

See *Rudiger v. Railway,* 68 N. W. 661; *Johnson v. City,* 135 N. W. 481; *Measar v. Light Co.,* 222 N. W. 809; *Schwab v. Nelson,* 25 N. W. (2d) 445.

II. With respect to actions under the survival statute, the right of action is in the personal representative. W. S., Sec. 287.01. Actions for wrongful death must be brought by the personal representative except where there is no cause of action in favor of the estate, in which case the relatives enumerated are authorized to bring the action in their own name. W. S., Sec. 331.04.

III. Damages for loss of support to next of kin dependent upon the deceased are recoverable by the personal representative under the wrongful death statute. *Castello v. Landwehr,* 28 Wis. 522; *Maloney v. P., L. & H. Co.,* 193 N. W. 399.

Damages sustained by the decedent's estate are recoverable under the survival statute. *Zartner v. Holzhauer,* 234 N. W. 508; *Krueger v. Hanson,* 300 N. W. 474. Where a cause of action in favor of the estate survives under Section 331.01, funeral expenses constitute a proper item of damage recoverable therein. However, by express amendment of Section 331.04 (W. S., Sec. 331.04), where no cause survives under the survival statute, funeral expenses may be recovered by the relative or survivor mentioned in Section 331.04, if such relative or survivor has paid or assumed liability therefor. Medical and hospital expenses are recoverable under the survival statute. *Johnson v. City, supra.* It would appear that if such expenses were paid by wife, husband or parent they would be an includable element of damages under the wrongful death statute. See *Koehler v. Milk Co.,* 208 N. W. 901.

The action for pain and suffering survives under the survival statute as "damage to the person." *Nygaard v. Oil Co.,* 284 N. W. 577.

The value of services of a wife to the

surviving husband, or vice versa, constitute a part of the "pecuniary injury" for which damages are allowable in the death action. *Wasicek v. Baking Co.*, 191 N. W. 503. Such value must be proved pecuniary to sustain a recovery therefor.

Section 331.04 (2), authorizes the recovery of damages for "loss of society and companionship" in the wrongful death action. Subsection (2) of Section 331.04 does not create a separate cause of action but merely creates a new item of damage recoverable in the wrongful death action.

IV. Wrongful death of a minor.

Statute: No special statutory provision.

The value of services of deceased child to his parent, both before and after majority, are recoverable, provided shown to be pecuniary. *Thomas v. Oil Co.*, 190 N. W. 559; *Ptak v. Kuetemeyer*, 196 N. W. 855; *Boyle et al v. Larzelere et al*, 13 N. W. (2d) 528.

V. Statute of limitations is two years after death. W. S., Sec. 330.21. This section refers to survival actions as well as wrongful death actions. *Staeffler v. Woodenware Co.*, 87 N. W. 480; *Schilling v. Railroad*, 13 N. W. (2d) 594.

VI. The amount recoverable in a wrongful death action is limited to $12,500.00. Similarly, there is a $2,500.00 limitation on the amount recoverable for "loss of society and companionship" as specifically authorized in Section 331.04. W. S., Sec. 331.04.

VII. The action does not abate upon death of the wrongdoer. W. S., Sec. 331.01, supra.

WYOMING

I. (A) Statutory provision.

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. Provided that in the event of the death of the person so liable, such action may be brought against the executor or administrator of his estate: provided further, that if he left no estate within the State of Wyoming, the court may appoint an administrator upon application being made therefor." Wyoming Compiled Statutes, 1945, Annotated, Official Edition, Vol. 1, Chap. 3, Art. 4, Sec. 3-403.

(B) Construction and interpretation.

Wyoming also has a survival statute. W. C. S. A., 1945, Vol. 1, Chap. 3, Art. 4, Sec. 3-402.

See *Mestas v. Coal & Coke Co.*, 76 P. 567; *Tuttle v. Short*, 288 P. 524.

II. The right of action is in the personal representative. W. C. S. A., 1945, Vol. 1, Chap. 3, Art. 4, Sec. 3-404.

III. Section 3-404 provides that "the court or jury may consider, as elements of damages, the amount the survivors failed or will fail by reason of the death, to receive out of the decedent's earnings, and any other pecuniary loss directly and proximately sustained by the survivors by reason of such death including funeral expenses, and further, the court or jury may add as an element of damage, a reasonable sum for the loss of the comfort, care, advice and society of the decedent." W. C. S. A., 1945, Vol. 1, Chap. 3, Art. 4, Sec. 3-404.

Loss of support to next of kin dependent upon deceased is recoverable under the death statute. *Coliseum Motor Co. v. Hester*, 3 P. (2d) 105. Since the statute only authorizes loss sustained by reason "of such death," it would appear that medical and hospital expenses, which are obviously not incurred as a result of the death, are not recoverable under the death statute. There are, however, no cases. The *Hester case, supra*, held that damages for the survivor's pain and suffering are not recoverable.

IV. Wrongful death of minor.

Statute: No special statutory provision.

Although there are no cases, it seems likely that the administrator may recover the value of deceased child's services to its parent if shown to be pecuniary.

V. Statutory limitations is two years from death in wrongful death actions. W. C. S. A., 1945, Vol. 1, Chap. 3, Art. 4, Sec. 3-404.

VI. There is no statutory limitation of the amount recoverable.

VII. The action does not abate with the death of the wrongdoer. W. C. S. A., 1945, Vol. 1, Chap. 3, Art. 4, Secs. 3-402 and 3-403.

Report Of Life Insurance Committee

AS has been the custom in the past few years, your life insurance committee, consisting of 17 members, has carried on its activities entirely by correspondence, with each member assisting in the selection of topics for discussion. This report consists of discussions of broad fields of law as well as a brief summary of cases in the field of life insurance law, which the members considered as being of general interest and special significance to a substantial part of our membership, comprising as it does trial counsel and home office counsel. Although practical considerations prevented the inclusion of all cases and subjects suggested, the committee feels that the topics selected will be of particular interest to trial counsel, and it is hoped that home office counsel will find the substance of this report useful and beneficial.

IN THE FIELD OF LEGISLATION

The impact of the United States Supreme Court decision in the S. E. U. A. case continues to reverberate in the life insurance industry. A concrete example of this appeared in the introduction in Congress of a proposal to investigate the life insurance industry from which its sponsor, Rep. Celler, hoped to derive specific suggestions for Federal legislation. As the matter developed, the measure was rejected in the Senate Rules Committee, but the intention was to scrutinize the effectiveness of state regulation, life company investments and their effect upon the general economy, and company compliance with anti-trust laws. (See the two previous annual reports of this committee.) Another Congressional enactment which will concern life companies is Senate Concurrent Resolution No. 26, sponsored by Senator O'Mahoney, which authorizes an investigation of the effect of investments in general upon economic conditions.

Continued operation of the New York State Joint Legislative Committee on Insurance Rates and Regulation, better known as the O'Mahoney Committee, is assured by adoption of an enabling resolution in the New York legislature. During the past year the committee's attention was directed toward the divers problems of company investment practices, effectiveness of fair trade laws, life company size and unauthorized insurers. An open meeting held in January, 1949, resulted in committee recommendation of a formula limiting life company investments in any one enterprise to 5% of admitted assets, and this suggestion is now law.

The trend toward uniform treatment of insurance problems in the various states was furthered by enactment of the all-industry model bills covering fair trade practices in five states (Arkansas, Maine, Maryland, Montana and Nevada). Three states modified their laws in the direction of uniformity (Colorado, Michigan and North Carolina). As noted in last year's report, all 48 states, Alaska, Hawaii, Puerto Rico and the District of Columbia have had in effect since 1948 some form of rate regulatory laws. Oklahoma, the only hold-out in enactment of Guertin legislation, enacted a modified form of Guertin law during the 1949 session of the legislature.

As a supplement to the material on this subject presented in last year's report, it will be noted that there has been a repeal of existing community property laws in Oklahoma, Oregon and Nebraska. A repeal of the law in these three states is not completely unexpected because, as noted in last year's report, the laws of these three states were similar to the Pennsylvania statute and accordingly, may have been open to the same objections as to constitutionality.

When the new Revenue Act of 1948 became law in April of that year, a matter of immediate concern to all insurance companies and to their many policyholders was: How can proceeds of life insurance policies be made to qualify for the marital deduction?

LIFE INSURANCE POLICIES AND MARITAL DEDUCTIONS

The 1948 Revenue Act created entirely new concepts with respect to property rights and granted certain deductions for Federal Estate Tax purposes. Laws which create new rights in property and laws which give tax deductions are strictly construed against the taxpayer. It was an entirely new law and hence there were no rulings or regulations to serve as a guide,

yet within the space of a very short time insurance companies were called upon to issue bulletins interpreting the law and setting forth procedures whereby the benefits of the marital deduction could be obtained with respect to insurance proceeds payable under the various optional modes of settlement.

The original policy contracts of the various insurance companies were drafted many, many years ago. When the contracts were first adopted, as well as at the times when new series were issued or amendments made, no intimation could have been had that at some future date, in view of some new revenue act, the phraseology employed therein would be closely scrutinized as to its effect on possible estate tax deductions. Over the years these policies have been construed and interpreted by lawyers and by the courts, and established practices and procedures have grown up and been formulated. In order to permit policyholders and beneficiaries to qualify their policies for the marital deduction it became necessary to make certain amendments. From the viewpoint of an insurance company the problem was to devise the necessary amendments so that they would harmonize with the policy contracts and would not do violence to company practices.

Before proceeding any further it might be well to make just a few preliminary observations. The use of the marital deduction in many cases will result in tax savings, but it is equally true that frequently the use of this deduction will be inaffective or even detrimental. Careful consideration must be given to the individual facts in each case before any change in existing insurance arrangements can be recommended because:

(a) the marital deduction will not result in tax savings in estates unless the net estate exceeds the exemption which is presently $60,000;

(b) property passing to the wife under the marital deduction provision becomes a part of her estate and taxable as such at her death. If she has a substantial estate of her own, the total taxes may exceed the amount which would have been payable had the insured elected not to use the marital deduction;

(c) most insurance companies have always stressed the benefits of careful estate planning. The use of the marital deduction involves changes in beneficial designations which may not be consistent with the wishes of the insured. It is necessary, therefore, to carefully weigh the advantages of the marital deduction against possible disadvantages resulting from necessary changes in the insured's estate plans.

Regulations 105, Section 81.47a reads in part as follows:

"(d) Proceeds held by the insurer under a life insurance, endowment, or annuity contract, with power of appointment in surviving spouse. Section 812 (e) (1) (G) provides a special rule in the case of a property interest which passed from the decedent in the form of proceeds held by the insurer under the terms of a life insurance, endowment, or annuity contract, which satisfy the five conditions hereinafter stated. With respect to such proceeds, the expression 'passed from the decedent to his surviving spouse' embraces not only the interest of such spouse under the contract but also the interest thereunder subject to her power to appoint. The five conditions which must be satisfied by the terms of the contract are as follows:

"(1) The proceeds must be held by the insurer subject to an agreement either to pay the proceeds in installments, or to pay interest thereon, with all such amounts payable during the life of the surviving spouse payable only to her.

"(2) Such installments or interest must be payable annually, or more frequently, commencing not later than 13 months after the decedent's death.

"(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint all amounts so held by the insurer.

"(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

"(5) The amounts payable under such contract must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse."

Insurance proceeds payable to the surviving spouse in a lump sum will qualify for the marital deduction. Regulations 105, Section 81.37a (2) reads in part as follows:

"The following are given as illustrative: * * * (iii) proceeds of insurance upon the life of H are considered as having passed from H to W if the terms of the contract meet the requirements of paragraph (d) of this section, or if under the terms of the contract the proceeds are payable to W in a lump sum * * *."

Most insurance company policies provide, at the election of the insured, for settlement of the proceeds under one or more option settlements. Generally speaking these options are:

1. Interest option,
2. Fixed period option,
3. Fixed amount option,
4. Period certain and life option,

which for the purposes of this article will be referred to as options 1, 2, 3 and 4.

Life insurance proceeds payable under an option should be eligible for the marital deduction in the following instances:

Option Settlement Without Contingents. Where settlement is with the surviving spouse under options 1, 2, 3 or 4 in all cases where no contingents are named.

Option Settlements With Contingents. Where settlement is with the surviving spouse under options 1, 2, 3 or 4 even though contingents are named if (a) the beneficiary has the privilege of commutation or withdrawal, or (b) if the contract has been amended by endorsement to give the beneficiary the power to revoke contigents. The form used by one company for this purpose is as follows:

"Notwithstanding any policy provisions to the contrary, it is understood and agreed that in event Mary Doe survives me, she shall have the right to revoke the foregoing designation of contingent beneficiaries and option settlement applying to said contingent beneficiaries; and thereupon said Mary Doe shall have the power to appoint all amounts payable hereunder in favor of the executor or administrator of her estate."

Of course it goes without saying that the contracts of all insurance companies are not alike and that it will be necessary to examine the provisions of each particular contract to determine whether in a given instance the proceeds will be eligible for the marital deduction. The companies have prepared various types of endorsements for the convenience of their policyholders whereby policies may be amended, where necessary, to obtain the benefits of the marital deduction. The position taken by an insurance company in furnishing these forms is that while it is believed that the deduction will be permitted when the contract is amended in accordance therewith, nevertheless the results cannot be guaranteed and it must be understood that the responsibility for making the proceeds eligible to the marital deduction is upon the insured and his own personal attorney.

* * *

During the past year the Supreme Court of Iowa handed down a decision which should be of interest to both home office counsels and trial counsels.

MODIFICATION BY INSURER COMPANY OF AGENTS' CONTRACT:

LIFETIME CONTRACT

The case of *Lewis vs. Minnesota Mutual Life Insurance Company*, 35 N. W. (2) 51, (Iowa Dec. 14, 1948), and 37 N. W. (2) 316 (May 3, 1949) is an interesting case involving the claimed modification of an insurance company's contract with one of its agents. The May 3, 1949, opinion was rendered at the rehearing of the Matter, and such opinion was substituted for the Original opinion rendered on Dec. 14, 1948. This was an action at law for damages by a former agent of the insurer to recover damages claimed by reason of the termination of a purported lifetime contract. The agent, Lewis, contended that the written contract which he had with the insurer and its general agent was modified by an oral contract by which the insurer agreed to retain him as an agent for his lifetime. On November 1, 1943, Lewis entered into a contract with the general agent in Des Moines, Iowa, and with the insurer as a party of the third part. This contract provided that the agency "* * * shall continue during the will and pleasure of the parties hereto subject to termination by any party hereto at any time upon at least fifteen days' written notice * * *." The contract further provided for renewal commissions on premiums paid on policies for

the second to the tenth policy years, inclusive, and also provided that if the agency agreement was terminated, there should be deducted from the renewal commissions a collection fee of 2% of the 5% renewal commission. The evidence was that by July, 1945, or nearly two years after entering into the contract, Lewis had become one of the insurer's leading producers and because he had received offers of employment in other types of business, Lewis communicated with the insurer's vice president and superintendent of agencies. At the vice president's suggestion Lewis went to St. Paul to confer with the vice president and the general agent, and it would appear from the evidence that such trip was for the primary purpose of discussing Lewis' future with the company. Lewis testified that during a fishing trip promoted by the vice president at the time of his visit to St. Paul, the vice president offered him a "lifetime contract," and at a subsequent social function at the vice president's home Lewis agreed to such a contract after having had impressed upon him the substantial employment security offered by an insurance company as compared with employment in other types of industries. At the trial both the vice president and the general agent testified that there was no such thing as a "lifetime contract" and both denied using any such words. On February 17, 1947, the general agent called Lewis on the telephone and advised him that his contract was terminated immediately (note: no 15 days' advance notice was given Lewis as called for by the contract). The insurer offered no reason for terminating the contract but relied on the original terms of the written contract permitting termination at will. Upon the trial in the lower court a verdict was returned in favor of Lewis and thereafter the defendants filed a motion for judgment notwithstanding the verdict or for a new trial. The motion for judgment notwithstanding the verdict was sustained and the plaintiff appealed resulting in the case being discussed herein. The Supreme Court affirmed the lower court in a five to four decision on the basis of the four general grounds discussed separately below.

The first general reason offered by the majority of the court was that "a review of the record satisfied us that there was an insufficiency of evidence to show that the contract was modified (to a lifetime contract).[1] At most it is shown that there was some consideration given to a change of contract but we are unable to hold that it was definitely modified. The evidence is too indefinite."[2]

As to the definiteness of a contract the court held that the terms thereof must be complete and sufficiently definite to enable the court to determine whether it has been performed or not, and that the terms and conditions are not sufficiently definite unless the court can determine therefrom the measure of damages in the case of breach (citing *Ingram-Day Co. vs. Rodgers,* Miss., 62 So. 230).[3]

The court then went on to say with respect to Lewis' claim that the company was under obligation to give him a lifetime employment, that "there is nothing in the claimed modified contract by which the appellant (Lewis) was obligated to continue in employment for any length of time.[4] There is not sufficient evidence of a contract by which the appellees (insurer) could be held to any definite damages."[5]

The second general grounds for affirming the judgment of the trial court was that "there is an absence of evidence showing that there was any additional consideration for the claimed lifetime agreement. The giving up of the opportunity to take other employment cannot be held to be an additional consideration." For support the

[1]The dissent fully reviewed the facts and said: "a fair interpretation of the language, under all the circumstances shown in the record, does not sustain the finding of the majority * * * that the evidence of modification is indefinite. On the contrary it is clear and explicit."

[2]In this connection see *Elwell vs. State Mutual Life Assurance Co.,* Mass., 119 N. E. 794, where an oral contract continued the sub-agent's former written agreement with but one change; later the subagent was discharged and he sued to recover renewals which accrued after his discharge. The court held the contract was noncancellable and the subagent was held entitled to renewals.

[3]Also see 48 L. R. A., N. S. 435; for other cases dealing with indefiniteness of lifetime contracts see: *Maxson vs. Mich. Cent. Ry. Co.,* Mich. 75 N. W. 459, 461; *Gensman vs. West Coast Power Co.,* Wash., 101 Pac. (2) 316, 319; *Lightcap vs. Keaggy,* Pa. Super., 194 A 347; *Hess vs. Iowa Light Co.,* Iowa 221 N. W. 194; *Heideman vs. Tall's Travel Shops,* Wash., 73 Pac. (2) 1323, 1325.

[4]The dissent points out that "this finding simply overlooks the evidence that plaintiff did promise to work for defendents 'the rest of his life'."

[5]The majority cites the case of *Ingram-Day Co. vs. Rodgers,* Miss., 62 So. 230, for support, but as noted by the dissent this "case turned on the absence of any stipulation specifying the position to be filled and the compensation to be received therefor. It furnishes no support for the statement of the majority opinion" quoted above.

court cites the cases of *Skagerberg vs. Blandin Paper Co.*, Minn., 266 N. W. 872; *Rape vs. Mobile & Ohio Ry. Co.*, Miss., 100 So. 585; and *Lynas vs. Maxwell Farms*, Mich., 273 N. W. 315.[6]

The majority thereby is following a rule that two considerations were necessary in order to support the allegedly modified contract. Although the majority did not quote the rule in so many words, the general rule seems to be as stated in 56 Corpus Juris Secundum, Master and Servant, Sec. 8c, page 78:

> "* * * where the intent to enter into a contract for permanent employment, not terminable except pursuant to its express terms, is not clearly expressed, *and there is no evidence showing consideration other than a promise to render service*, the assumption will be that, even though the parties speak in terms of permanent employment, the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party." (Emphasis supplied.)

The dissent in its opinion agreed that this rule "is accepted in principle by most courts," but the opinion of the dissent then went on to say there is, however, "much disagreement as to its application." (Citing 35 A. L. R. 1432 and 135 A. L. R. 646.) The dissent felt that the majority misapplied the rule, because to require two considerations in this case, caused a departure "from the established rule of a promise for a promise." The position which the dissent takes in this matter can best be illustrated by referring to the following three cases: *Littell vs. Evening Star Newspaper Co.*, App. D. C., 120 Fed. (2) 36,[7] which was followed in *Eggers vs. Armour & Co.*, 8 Cir., 129 Fed. (2) 729, and again in *Abbott vs. Arkansas Utilities Co.*, 8 Cir., 165 Fed. (2) 339.

Based upon the reasoning in these three cited cases, it will be noted that there may be a serious question as to whether two considerations are required in order to support a contract involving "permanent employment." At least it can be safely said that some courts—should a case such as the Lewis case come before them—would probably not agree with the Iowa Supreme Court majority on this point.

With particular reference to the above cited case of *Littell vs. Evening Star Newspaper Co.*, (see footnote 7), it seems that, regardless of whether two considerations are necessary, perhaps there may actually have been *two* considerations in the *Lewis* case, even though the majority said that "the giving up of the opportunity to take other employment cannot be held to be an additional consideration." In this connection it is noted that it is a well established rule of contracts that a forbearance or detriment or promise of forbearance is consideration.[8] It would appear that because the evidence is clear that Lewis promised to "turn down" the other offers made to him, that perhaps there was a definite consideration for the promise of the insurer company made through its vice president. (This, of course, assumes that the evidence was sufficient to show that the insurer company had actually made a promise of "permanent employment.")

The third reason given by the majority of the court was that because the evidence showed that Lewis was under no obligation during the period of the claimed modified contract to continue his services as an agent, the contract was unenforceable. The majority cited the established rule that "where one party to a contract is not bound to perform it and cannot be held liable for failure of performance there is a lack of mutuality and it is unenforceable." The court did not discuss the numerous cases bearing on this pronouncement but did cite many cases as authority therefor (see page 56 of case).[9] The majority, according-

[6]For additional cases supporting this contention see the cases cited in the *Lynas* case; and also 35 A. L. R. 1422, 1427, 1432; 135 A. L. R. 646; *Edwards vs. Kentucky Utilities Co.*, Ky., 150 S. W. (2) 916. But see *Fletcher vs. Agar Mfg. Co.*, Mo., 45 F. Supp. 650; and 56 Corpus Juris Secundum, Sec. 181, page 875, Master and Servant, pages 78, 79, Sec. 8. With respect to the majority's holding that the giving up of other opportunities to obtain work is not additional consideration, see infra.

[7]It should be noted that the court in this case used as an example of a so-called "second" consideration, an instance where a person is "giving up his own business"; in this connection it will be recalled that Lewis gave up taking other positions open to him; this point is discussed more fully infra.

[8]See authorities cited in parenthesis at the end of footnote 6; and also *Millsap vs. National Funding Co.*, Calif., App. 135 Pac. (2) 407, 409; *Weber vs. Perry*, S. C. 21 S. E. (2) 193, 195; *Lucacher vs. Kerson*, Pa. Super., 45 A (2) 245, 248; and *Carnig vs. Carr*, Mass., 46 N. E. 117, 35 A. L. R. 512.

[9]However, as already noted in footnote 4, Lewis did, according to the testimony, promise to work for the insurer as an agent for his lifetime.

ly, took the position that, even though there had been sufficient evidence of the agreement, the alleged contract could not be enforced because of no mutuality of obligation. In this connection reference is made to the case of *Swart vs. Huston,* Kas. 117 Pac. (2) 579, wherein it is said:

> "* * * plaintiff was privileged to quit whenever he should see fit. How then could it be held that defendant had no right to discharge plaintiff whenever he chose to do so and that he should be penalized for so doing."

The fourth reason given by the court can be summarized in the following words of the majority opinion:

> "There is no evidence presented on the part of the appellant that Harold J. Cummings (insurer's vice president) had authority to enter into the claimed lifetime contract. * * *. It is * * * very definitely shown that the appellee company had in no way authorized Cummings, the vice president, to enter into such a contract as claimed by appellant. On the contrary it is shown that a vice president would not have had such authority to enter into such an agreement."

Along with its factual findings the majority made certain conclusions of law, namely, if the president has no authority to perform a specified act, then his act cannot bind the corporation. The court cites the case of *Heaman vs. E. N. Rowell Co.,* Inc., N. Y., 185 N. E. 83, wherein it is said at page 84:

> "* * * Alleged contracts of life employment are, however, so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized. The president or other executive officer of a corporation has no authority as such to make a contract that one should remain in the corporate employ for life even under a general power 'to appoint, remove and fix the compensation of employees.' That any board of directors or other persons responsible for the management of a corporation should give such unusual power to an executive officer cannot be implied. Plain language of the managing board, clearly showing that such was the intention of the corporation, coupled with power actually or impliedly vested in the corporation itself, must be found to justify such a hiring. (Citing cases.)."[10]

COMMENT: As noted in the first part of this discussion the court, upon application granted a rehearing by a 5 to 4 vote of the Justices. The opinion of the court upon rehearing is found at 37 N. W. (2) 316 (May 3, 1949), and in that opinion the court, by a 5 to 4 vote, reaffirmed the original opinion with supplemental comments, all of which are embodied in the rehearing opinion. The fact that the court voted 5 to 4 for a rehearing, and subsequently voted 5 to 4 to reaffirm the original opinion, demonstrates the troublesome nature of cases of this type. Perhaps the difficulty of the problem, and the resulting vacillation of the Justices in their voting, can be explained by the conjectural nature of the questions of fact, which are often resolved by the uncorroborated testimony of the parties to the action.

Lawyers in the field of insurance are occasionally confronted with cases of disappearance, and accordingly it seemed advisable to survey at some length certain of the legal perplexities surrounding this field of the law.

DEATH OR DISAPPEARANCE?

While death is certain, the law does not require certainty of proof to establish such event. Beyond question many persons have long survived the legal adjudication of their demise and particularly is this true with reference to "disappearance" cases where life insurance benefits are at stake.

The textbook rule is that death may be proved by direct or circumstantial evidence or by proof of facts sufficient to raise a presumption of death. But—as has been most aptly said,

> "In the court rooms and in the textbooks the whole question of disappearance is befogged by much discordant talk about presumptions; and that is a subject which, in the langauge of a treatise written more than 300 years ago, is 'con-

[10]But for a seemingly contrary holding see *Baltimore* and Ohio Ry. Co. vs. Foar, 7 Cir., 84 Fed. (2) 67, at page 70: "The consensus of judicial opinion throughout the United States is that a corporation by its proper officers may lawfully enter into a life contract with an employee." Also see the case of *Eggers vs. Armour* & *Co.,* 8 Cir., 129 Fed. (2) 729, discussed under Sec. 2 above, and cited by the dissent.

fusa, inextricabilis fere' (confused and well-nigh inextricable)."[11]

It is interesting to note that while the presumption of death from long continued absence is of ancient origin,[11a] the rule which gives rise to the presumption after seven years' absence is modern, comparatively speaking. The period of seven years was adopted, because that was the time fixed by acts of the English Parliament relating to bigamy and the termination of life estates and leases.[12]

That the courts are hopelessly divided as to the fundamental nature of this presumption clearly appears from the fact that each of the following divergent views has support in the decisions:

> "This diversity of opinion arises in the main from the different views of jurists concerning the presumption of life. Thus the courts of some jurisdictions maintain that, inasmuch as a person once shown to be alive must be presumed to continue to live, and as such presumption ceases to operate only where cut off by the presumption of death arising from the absence, unheard of, of the person for seven years, such person cannot be presumed to have died before the expiration of that period of time, and that consequently, in the absence of any evidence to the contrary, he will be presumed to have lived during the entire period. * * * According to the authorities thus reasoning, at the end of seven years the legal presumption establishes not only the fact of death, but also the time of death; and, in the absence of any fact except that of disappearance of the insured under such circumstances that the legal presumption of death is applicable, he is presumed to have died on the last day of the seven years. * * *
>
> "On the other hand, it is asserted in England and by the weight of American authority that, in the case of an unexplained absence of the insured for the requisite time, the law raises no presumption as to the precise time of death; that the time of death is still altogether in doubt, and must be shown by evidence of some sort."[13]

The outcome of your case may turn upon which horn of this legal dilemma is grasped by the court. It has been said that,

> "Implicit in every case involving the seven-year presumption of death is the ultimate question of the determinative weight to be given different inferences. It therefore seems clear that the ordinary formulae concerning the court and jury are of little value in a case of this nature."[14]

My subsequent discussion will be divided into the two factual situations which are generally presented by disappearance claims.

The problem is simplified—and the result reasonably foreseeable in the run-of-mine case, without the gift of prescience, where plaintiff's proof negatives voluntary disappearance and shows unexplained absence for the statutory or common law period prior to the institution of suit. In such event, and provided the policy has not been allowed to lapse, recovery will, under the rule applied in most jurisdictions, ensue[15] in the absence of counter evidence sufficient to overcome the presumption. Indeed many courts go further and in effect hold, albeit unsoundly, that the issue is for the jury unless the evidence is of such nature as to compel the inference that the insured is still alive.

At this point it may be well to discuss certain principles which are of general application in this field of the law. It is, in all instances, essential for the beneficiary

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[11] In an able discussion of "Disappearance and Other Analogous Claims" by Professor Wm. R. Vance, published in the proceedings of the International Claim Association, Twenty-second Annual Convention.

[11a] Lord Ellenborough in the early case of *George vs. Jesson* (1805) 6 E. 80, 85 expresses the rule as follows: "The presumption of the duration of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time when they were last known to be living." Although this statement is frequently referred to, it should be noted, however, that this early expression of the law is not a satisfactory statement of the rule, as it involves the use of the word "presumption" in the sense of "inference." As will be noted subsequently, there is no presumption of the duration of human life although there may be a permissible inference. There is, however, a presumption (or rule) of death under the circumstances mentioned.

[12] *Hansen vs. Central-Verein*, etc., 223 N. W. 571 (Wis.).

[13] Statement of annotator in 75 A. L. R. 632.

[14] *Westphal vs. Kansas City L. Ins. Co.*, 126F. (2d) 76 (7th CCA).

[15] See as typical recent cases of *Patrick vs. Union Central L. I. Co.*, (Neb.) 13 Life Cases 424 and *Met. L. I. Co. vs. Edelen's* Exrx. (Ky.) 13 Life Cases 454. For exceptionally able decision on this question see *Brunny vs. Prudential*, Note 11 post.

to initially prove the facts and circumstances attending the disappearance, absence and search for the insured in order to raise the presumption of death. It would appear axiomatic that the fact of disappearance or unexplained absence, or lack of tidings, standing alone, will not suffice.[16] The prerequisites which justify the presumption have been stated as being (1) disappearance of the insured from his last place of residence, (2) failure to return and to communicate with those with whom he would naturally communicate, if alive, and (3) diligent inquiry as to his possible whereabouts.[17] It has been well said that the person invoking the presumption must produce evidence to justify the inference that death is the probable reason for the unexplained absence, and why nothing is known of him.[18]

Of vital importance is the controversial question, incident to all presumptions, as to whether any artificial probative effect shall be given to the presumption of death.[19]

A review of the cases demonstrates the soundness of the following proposition:

> "The great weight of authority at the present day supports the view that a presumption is not evidence and has no probative force, and that where the opponent offers some substantial evidence to the contrary, the presumption disappears and should not be weighed by the jury, although they may still draw reasonable inferences from the facts which gave rise to the presumption."[20]

Although the stated principle has long been firmly established, many courts continue to thwart a fair administration of justice by their refusal to forthrightly hold that the presumption is a mere procedural device, the sole effect of which is to place upon the party, against whom it operates, the burden of going forward with the evidence.

It is refreshing to note the sound reasoning employed by Judge Zimmerman, speaking for the Ohio Supreme Court, in the recent case of *Brunny vs. Prudential Ins.* Co., 151 O. S. 80, 13 Life Cases 735. In denying recovery to the plaintiff, who relied exclusively on the presumption of death to establish her case, the following announcements were made:

> "It is firmly settled in Ohio that the burden which rests upon the plaintiff to establish the material averments of his cause of action by the preponderance of all the evidence, never shifts. And in a case where the plaintiff may be aided by a rebuttable presumption of law or by such facts as prima facie support his contention his opponent need do no more than counter-balance the presumption or prima facie case; he is not required to over-balance or out-weight it. So, where the whole of the evidence upon the issue involved leaves the case in equipoise, the one affirming must lose. (Citing cases.)
>
> "Thus a party against whom a presumption is invoked, removes its effect when he produces rebutting evidence of a character which leaves the evidence as a whole in such a state that it cannot reasonably be said that the presumption should prevail over the evidence offered to destroy it.
>
> "Presumptions may supply the want of facts, but they cannot stand against positive facts. (Citing cases.)
>
> "This court has stated that the presumption against suicide 'is in the nature of evidence' and loses its force in the fact of proof indicating the contrary. (Citing cases.)
>
> "We are aware that in a number of cases it has been held, upon the particular facts, that where the presumption of death obtains by a showing of seven years unexplained absence and rebuttal evidence is offered, a jury question is presented. (Citing cases and text authority.)
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> "However, in a case, where the rebuttal evidence in its *cumulative effect* at least counterbalances the presumption of death, the one relying solely upon the

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[16] *Karst vs. Chicago F. L. Assn.* (Mo. App.) 22 S. W. (2d) 178; *Unwin vs. John Hancock M. L. I. Co.*, (Mo. App.) 43 S. W. (2d) 899; *Amer. N. I. Co. vs. Garcia* (Tex.) 46 S. W. (2d) 1011; *Met. L. I. Co. vs. Williams* (Ark.) 125 S. W. (2d) 441; *Met. L. I. Co. vs. Fry* (Ark.) 41 S. W. (2d) 766; *Nat'l. L. & A. I. Co. vs. Ruffin* (Ala.) 187 So. 488; *Fink vs. Prudential I. Co.*, (Ore.) 90 P. (2d) 762; *W. O. W. L. I. Soc. vs. Cooper* (Tex.) 164 S. W. (2d) 729.

[17] *Piersol vs. Mass. L. I. Co.*, 260 Ill. App. 578.

[18] *Butler vs. Mutual L. I. Co.* (N. Y.) 121 N. E. 758.

[19] See Generally, 16 A. J. 23, Sec. 24.

[20] 115 A. L. R. 404. See also note in 95 A. L. R. 878, and statement in 5 Wigmore on Evidence (2d Ed.) pages 452, 453, Sec. 2491.

presumption to make his case must fail."[21]

The principles above set forth demonstrate the grevious error into which a court falls by referring to the presumption in its charge to the jury.[22] Inasmuch as there is no conceivable legal basis for so doing, which fact must be apparent without mental strain, it is difficult to understand why this error continues prevalent.

It is generally held that evidence of any nature tending to show a motive for the disappearance is always admissible to rebut the presumption of death arising from absence. Thus the cases uniformly support the rule that the fact that an absentee is a fugitive from justice, although it does not prevent the presumption of death from absence from arising, is admissible in evidence to rebut the presumption of death.[23]

Evidence that the domestic relations of the absentee insured were unhappy, or that he had little regard for his family or friends is of importance in the above regard.[24]

The second and more troublesome group of cases, considered from the angle of proof, is that where it is incumbent upon the beneficiary to establish that death of the insured occurred prior to the expiration of the presumptive period.

The following statement in Appleman's treatise on Insurance Law, Vol. 2, pages 56 and 57, Sec. 742, is supported by the great weight of authority:

"The presumption fixing the time disappears, of course, upon proof of the time when death actually did occur. For that reason, a number of cases have stated bluntly that the presumption is one of the fact of death only, and that there is no presumption whatever as to the time when death did occur, that being an evidentiary matter to be determined by proof thereof. This rule was adopted by the courts in self defense against the chronic insistence of plaintiffs that the court determine death to have arisen at some convenient time within such period to prevent the lapse of insurance policies, or where, for some other reason, it becomes necessary for the plaintiff to show that death occurred prior to the expiration of the presumptive period."

Also note the language of the court in the early case of *Nepean vs. Doe* (1837) 2 Mees. & W. 894:

"We adopt the doctrine of the court of King's Bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof."[24]a

Unquestionably the task of the beneficiary is less difficult if he permits the pre-

[21]The following sound observations on this point were made in *Donea vs. Mass. Mut. L. I. Co.*, 19 N. W. (2d) 377 (Minn.):

"Giving a presumption to the jury to consider in determining the existence of a fact permits it to consider as evidence something which plainly is not. A presumption is not evidence and for that reason should never be considered as such by the jury. * * *

"Where there is rebutting evidence, which is for the trial judge to determine as a matter of law, the fact of death should be submitted to the jury for its determination upon all the evidence without considering the presumption. * * * The same evidence which gave rise to a presumption of death permits a finding of the fact of death, but the presumption, as such, cannot be considered in determining that fact."

[22]See also *Southland L. I. Co. vs. Norwood*, 76 S. W. (2d) 166 (Tex.); *Scott vs. Prudential Ins. Co.*, 282 N. W. 467 (Minn.); *Tyrrel vs. Prudential Ins. Co.* 192 A. 184 (Vt.) See also suicide cases in many of which this principle has been stated

[23]See annotation in 44 A. L. R. 1489.

[24]Annotated in 64 A. L. R. 1288.

[24]aThe following American cases support the same view: *Davie vs. Briggs*, 97 U. S. 628, 24 L. Ed. 1086; *State vs. Moore*, 33 N. C. 160, 53 Am. Dec. 401; *Whiteley vs. Equitable Life Assur. Soc.*, 72 Wis. 170, 39 N. W. 369; *Tisdale vs. Connecticut Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136; *McCartee vs. Camel*, N. Y. 1 Barb. Ch. 455; *Howard vs. State*, 75 Ala. 27; *Hancock vs. American Life Ins. Co.*, 62 Mo. 26.

It will be noted, however, that there is a line of decisions which lay down the doctrine that the presumption relates not only to the fact of death, but also to the time and fixes that time as the expiration of the seven years. They base this doctrine upon the supposed presumption of the continuance of human life, saying that the presumption suffices to establish life until the conflicting presumption of absence of seven years begins to operate and overcomes it. For a full discussion of this doctrine, justifying it and criticizing the original English rule, see Mr. Justice Field's opinon in *Montgomery vs. Bevans*, U. S. 1 Sawyer, 653, 662-668; Fed. Case No. 9735. See also in this connection: *Whiting vs. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Clarke's Ex'rs. vs. Canfield*, 15 N. J. Eq. 119; *Eagle's Case*, 3 Abb. Prac., N. Y. 218; *Burr vs. Sims*, Pa., 4 Whart. 150 33 Am. Dec. 50 (see foot note 28).

Also in the case of *Reedy vs. Millizen*, 155 Ill. 636, 40 N. E. 1028, the Illinois court adopted the rule which presumes that life continues during the entire seven year period but nonetheless by tortuous means the court came to a satisfactory solution which it might well have reached without resorting to any presumption of continuance of life.

sumptive period to run prior to instituting action, for he is thereby aided by the presumption of the fact of death from absence and is then in a much better position to establish the time of death.[25]

The doctrine was announced by the Supreme Court in the case of *Davis vs. Briggs*, 97 U. S. 628, 24 L. Ed. 1086, that in order to establish the time of death that proof must be made that at the time of the disappearance the insured "encountered some specific peril, or came within the range of some impending danger which might reasonably be expected to destroy life."

Although the principle that failure to adduce proof of specific peril is fatal to recovery has received a certain measure of support—generally in those cases where the presumptive period had run—it has been rejected by the vast majority of the courts. Indeed the Supreme Court said with reference to its prior decisions:[26]

> "But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuance of life, even though exposure to some particular peril was not shown."

What is the rule where the seven year period has not expired?

In this situation, as in the foregoing, the absence of proof of specific peril has infrequently been held a bar to recovery, as a matter of law, although the converse is true. Many courts have, either directly or by inference, rejected the doctrine.[27] However, there would appear to be a reasonable basis for the application of this doctrine, where action is brought before the end of the period, in those jurisdictions which have held that the presumption is that of the fact of continuance of life until it is overcome by the presumption of death. It would seem that the logical effect of this presumption is to require proof at the hands of the beneficiary sufficient to rebut or overcome the presumption. This rule presents a legal anomaly, i. e., a principle which inures to the benefit of insurance companies. However, but few courts have actually given legal effect to this presumption, which, if applied, should result in the direction of verdict for the insurer in many such cases.[28]

In the case of *Price vs. Life Ins. Co. of* Virginia, 176 S. E. 312 (S. C.), the court employed the above reasoning:

> "We agree with appellant's contention that there is an absence of any testimony tending to show that the insured expected or was exposed to any danger at that time or that he expected to go upon any prolonged journey and, therefore, it cannot be assumed that he died at that time. Under our view of the case, based on the record before us, in the absence of any testimony tending to show that Mr. Price died within seven years from September 4, 1922, or as to when he died, it must, under the rule, be assumed that he lived for seven years after his departure from home, September 4, 1922, and during that time, in order to keep the said policies alive, it was necessary to pay the premium on the same, which was not done. * * * Of course, under the rule, recognized in this state, the pre-

[25] See collation of cases on this proposition at page 636 of annotation in 75 A. L. R.

[26] *Fid. Mut. L. I. Co. vs. Mettler*, 185 U. S. 308; 46 L. Ed. 922. See also *U. S. vs. Hayman*, 62 F. (2d) 118 (5th CCA); *McCune vs. U. S.*, 56 F. (2d) 572 (6th CCA); *Travelers Ins. Co. vs. Bancroft*, 65 F. (2d) 963 (10th CCA); *Browne vs. N. Y. Life Ins. Co.*, 57 F. (2d) 62 (8th CCA).

[27] See *Kansas City L. Ins. Co., vs. Marshall*, 268 P. 529 (Colo.); *Sacket vs. Met. Life Ins. Co.*, 245 N. W. 499 (Mich.); *Carlson vs. Eq. Life Assur. Soc.*, 246 N. W. 370 (Minn); *Delaney vs. Met. Life Ins. Co.*, 257 N. W. 140 (Wis.); *Bergman vs. Supreme Tent*, 220 S. W. 1029 (Mo.); *Amer. Nat'l. Life Co. vs. Dailey*, 187 S. W. (2d) 716 (Tex.); *Ballinger vs. Conn. Mut. Life Ins. Co.*, 69 S. W. (2d) 1090 (Tenn.).

[28] In *Arnall vs. Union Central Life Ins. Co.*, 142 P. (2d) 838, the court denied a recovery on the ground that there was "no showing of a want of motive, which might have influenced him (the insured) to voluntarily leave." This conclusion was not, however, apparently bottomed on the further conclusion "A person in good health is assumed to live not die."

In *Glassock vs. Weare*, 234 S. W. 216 (Ky.), the court said: "Hence we conclude that the circumstances in evidence offered to prove his death previous to the death of Jacova in January, 1917, or in fact that he has ever died at all, are not sufficient to reasonably induce the belief that it was more probable that he died during that time than that he survived, and the presumption will then have to be indulged that he continued to live until the end of the seven year period, when the presumption of life continuance was overturned by the presumption created by the statute."

It would appear, from the reasoning employed, in connection with the approval of the presumption of the continuance of life, that the court in *Jefferson St. Life Ins. Co. vs. Hewlett*, (Ky.) 13 Life Cases 16, would, or certainly should, have directed verdict for the company under the above theory but for the effect of the presumption of death resulting from insured's absence for seven years.

sumption that the insured died September 4, 1922, is rebuttable; but we fail to find any testimony in the record warranting an inference that he died at any other time and to remove this presumption some testimony must be produced."

Entirely apart from the above question, the following text statement would appear sound:

"The time of death must be proved by a preponderance of the evidence, but it has been held that the proof must remove any reasonable probability that the person was alive at the stated time, and that, to warrant the inference that death occurred earlier than presumed, there must be proof of such facts and circumstances connected with the absent person as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period."[29]

It is fundamental that the time of death cannot be left to conjecture or speculation on the part of the jury. Therefore, in the absence of proof that the insured was subjected to a grave and imminent peril or of other extraordinary circumstances of such nature as either (1) to compel an inference of death at a particular time or (2) leave no other reasonable hypothesis which explains the absence of the insured other than that of his death at the time in question, verdict should of necessity be directed for the insurer.

Said principles are not, however, generally employed. On the contrary, it is frequently held that the issue is for the jury in the event the evidence preponderates in favor of the plaintiff and likewise where death is shown to have occurred at the requisite time by a fair preponderance of the evidence. Such conclusions are clearly erroneous for the reason that the evidence adduced by the plaintiff is, of necessity, circumstantial.

The following observation in the case of *Claywell et al vs. Inter-Southern Life Ins. Co. of Louisville,* Ky., 70 F. (2d) 569 (8th CCA), is here pertinent:

"When a party desires to establish the approximate date of death within the statutory period, he assumes the usual and necessary burden of presenting evidence of a material fact—that fact being the time of death. In 'disappearance' cases, it is obvious that there can be no direct evidence of death—otherwise, it would not be a 'disappearance' case. The proof must be circumstantial in character. The main, if not the entire, strength of circumstantial evidence is that the 'circumstances' shown point to but one logically probable conclusion."

Irrespective of the effect which may be given to the presumption, and notwithstanding the tortuous reasoning which has been employed by many courts in an effort to spell out a jury issue, it is nevertheless true that a beneficiary who attempts to establish the time of the insured's death—short of the presumptive period—is apt to find his task exceedingly arduous.

Certain of the courts have tossed an additional monkey wrench in the legal machinery by their announcements on the question of the admissibility and weight which should be given to letters of administration upon the issue of death. It would seem obvious that the rule laid down by the Supreme Court[30] to the effect that letters of administration are not legal evidence of death in an action on an insurance policy to which the administrator is not a party, is correct. However strange it may be, said principle has been sharply controverted.[31]

However, the weight of authority supports the view "that not only are letters of administration insufficient to make out a prima facie case of death in a collateral proceeding or independent suit, but they are not even admissible in evidence on this question.[32]

No purpose would be served by an attempt to dissect the judicial expressions on the above question. Quite probably the answer will be found in announcement by your own court, or possibly opposing counsel will be thoughtful enough to omit this additional twist from your case.

A further question, which is not infrequently presented, is whether the seven year period after an insured's disappearance suspends or tolls the statute of limitations relating to actions on written contracts. The general rule supported by the definite weight of authority is to the effect

[29]C. J. S. 1069.

[30]*Mut. Ben. Life Ins. Co. vs. Tisdale,* 23 L. Ed. 314.

[31]See Appleman, Vol. 2, page 42, Couch, Vol. 8, page 723, Sec. 2229, 25 C. J. S. 620.

[32]Annotation in 119 A. L. R. 620.

that in the event the fact of death can only be determined through the aid of the presumption of death from seven years' unexplained absence, the beneficiary's cause of action does not accrue until the expiration of the seven year period following the disappearance of the insured, and the statute of limitations does not begin to run until that time.[33] There are, of course, factual variations, as well as divergent legal principles, which may here pose questions which are by no means simple. Lack of space prevents discussion of the companion question of the time for making proof of death in this type case.[34]

In conclusion, it may be said that a review of the more recent decisions discloses a surprising—and comforting—disposition on the part of our jurists to apply the general rules applicable to the determination of the sufficiency of the evidence bearing upon any controverted fact issue—notwithstanding that the result of their so doing may be to deny recovery to a charming, though deserted, quais widow.[35]

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[33]Couch, page 5729, Sec. 1640; also see annotation in 34 A. L. R. 91 and 119 A. L. R. 1308.

[34]See discussion in Vance's article, supra, Note 1, and annotation in 16 A. L. R. 609.

[35]*American Nat'l. Ins. Co. vs. Dailey,* 187 S. W. (2d) 716 (Tex.). On typical evidence in this type case the court correctly said: "The evidence simply raises a number of conflicting conjectures. The selection of one surmise from among a number of sepculations is not the function of a jury. In such a case, the burden of proof determines the judgment."

Hogaboam vs. Met. Life Ins. Co., 21 N. W. (2d) 268 (Wis.): "There being no presumption that he died prior to said date plaintiff was required to establish the fact by a fair preponderance of the evidence to a reasonable certainty."

Kietzman vs. Northwestern Mut. Life Ins. Co., 13 N. W. (2d) 536 (Wis.): "We conclude that there is no evidence upon which the jury by any process other than guess or speculation could conclude that insured's death occurred within the period."

Hubbard vs. Equitable L. Assur. Soc., 21 N. W. (2d) 665 (Wis.), *Westphal vs. Kansas City Life Ins. Co.,* 126 F. (2d) 76 (7th CCA); *McKay, Admix. vs. N. Y. Life Ins. Co.,* 50 A. (2d) 914 (Me.) (Judgment entered for company on pleadings); *Arnall vs. Union Central Life Ins. Co.,* 142 P. (2d) 838 (Kan.) *Aetna Life Ins. Co. vs. Strobel,* 150 S. W. (2d) 965 (Ark.); *Schneiderman vs. Mut. Life Ins. Co.,* 3 N. Y. S. (2d) 35; *Thompson vs. Parrett,* 78 N. E. (2d) 419 (Ohio). *Brunny, Admix. vs. Prudential Ins.* Co., (Ohio) 151 O. S. 86 (January 1949) see note 11 supra.

(Inasmuch as "disappearance" cases appear rather infrequently, the batting average of justice in this field is amazingly high.)

ALCOHOLISM AS A SELF-INFLICTED INJURY

Last year's report discusses certain problems arising by reason of policy provisions excluding from life insurance coverage death due to self-destruction within two years of the date of the issue of the policy. Along this same general line are problems which come up in connection with coverage under disability clauses of life insurance policies providing that benefits will not be paid if the disability is due to a self-inflicted injury.

In the case of *Lynch vs. Mutual Life Ins. Co. of New York* (Pa. 1946) 48 Atl. (2) 877, the beneficiary-wife sued on a disability clause contained in two life insurance policies issued to her husband. Total disability was defined as "any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation," and the policies provided: "Disability benefits shall not be granted if disability is the result of self-inflicted injury." The insured had been drinking to excess for several years and had been treated at various institutions for alcoholism. The trial judge found that the insured had been totally and permanently disabled within the meaning of the policies since 1942, and that the disability resulted from chronic alcoholism which was self-inflicted, and gave judgment for the insurer. Expert medical testimony differed widely as to whether chronic alcoholism was a disease or an avoidable habit. On appeal the Superior Court of Pennsylvania *held,* that the judgment of the trial judge should be affirmed; that the insured was an intelligent person who knew the natural and probable results of his continued acts; and that the evidence showed he had discovered his vulnerability before he became an addict. The court also said that "we do not hold that chronic alcoholism is *as a matter of law* a self-inflicted injury. Our decision is that the evidence which the trial judge found credible justifies the conclusion that the disability suffered by this insured was self-inflicted."

The above type of definition of "total disability" appearing in the two policies was construed in the case of *Lorentz vs. Aetna Life Ins. Co.,* (1936 Minn.) 266 N. W. 699, to mean" * * * any occupation similar to one in which the insured was ordinarily engaged * * * or for which he may be capable of fitting himself in a rea-

sonable time." The case of *Henderson vs. Continental Casualty Co.* (Ky., 1931) 39 S. W. (2) 209, construed "occupation" to mean the insured's usual business. According to some authorities a common test of total disability is the inability to perform the customary and material acts of business in the usual manner. In this connection see *Dunlap vs. Maryland Casualty Co.* (S. C. 1943) 25 S. E. (2) 881, 149 A. L. R. 1; *Maze vs. Equitable Life Ins. Co.* (Minn. 1933) 246 N. W. 737; and 1 Appleman, Insurance Law and Practice, Sec. 651, pp. 805-806.

In policies which exclude recovery for self-destruction (see last year's report), it appears to be the general rule that even though the act from which the death resulted is intentional, recovery will be allowed so long as it can be shown that the ultimate effect was not intended. (See: *Courtemanche vs. Supreme Court,* I. O. F., 1904 Mich. 98 N. W. 749; 64 L. R. A. 668; and *Penfold vs. Universal Life Ins. Co.,* 1881 N. Y. 85 N. Y. 317). The question of self-inflicted injury has been adjudicated in many jurisdictions under variant policies and facts, and differing conclusions have been announced by the courts. Although the cases are not discussed in its decision, the court in the *Lynch* case cited several such cases in a footnote on page 879. However, two courts prior to the *Lynch* case, passed directly on the question of chronic alcoholism as a self-inflicted injury. In the case of *New York Life Ins. Co. vs. Riggins* (1936, Okla.) 61 Pac. (2) 543, the court applied the reasoning adopted in construing self-destruction provisions and held that even though the insured intended to drink, he did not intend to become an eventual chronic alcoholic. In the case of *New England Life Ins. Co.,* (1938, Md.) 199 Atl. 822, the court decided the case on the grounds that the insured was not aware of the latent dangers and the court held as a matter of law that he did not intend the result.

The *Lynch* case can perhaps be distinguished from the *Riggins* case and the *Hurst* case on the grounds that the insured in the *Lynch* case, should have known, as an intelligent man, that his constant drinking would lead to chronic alcoholism, and also he should have been aware of the latent dangers. In this connection it would seem that the *Lynch* case is sound from the standpoint that the law presumes that a man intends the natural and probable results of his voluntary acts. However, one argument against the holding in the *Lynch* case, might be that since courts have not appeared particularly hesistant to hold that mental disease can result in total and permanent disability to the insured (*Plummer vs. Metropolitan Life Ins. Co.,* 1933 Me. 169 Atl. 302; *Stuhlbarg vs. Metropolitan Life Ins. Co.,* 1944 Ohio, 55 N. E. (2d) 640, perhaps the chronic alcoholic should be viewed from a psychiatric standpoint and treat his ailment as a mental disease manifested through the use of liquor.

WHO IS ENTITLED TO PROCEEDS OF LIFE INSURANCE WHEN DESIGNATED BENEFICIARY PREDECEASES THE INSURED?

The answer to this question is to be found today primarily in the policy contract. This will be illustrated by a review of some of the latest court decisions. Most current policies with legal sanction permit the insured to elect to reserve the right to revoke and change his beneficiary. If he does so, then his beneficiary receives a mere expectancy—hardly an interest in any technical sense. It is not transferable or descendible and therefore certainly not a property right. This expectancy evaporates immediately upon the death of the beneficiary or when the insured exercises his prerogative to revoke or substitute another. Some decisions in Indiana, Connecticut and New Jersey prefer to call this expectancy a vested interest, but readily agree it may be divested by the exercise, free from any restraint by the beneficiary, of the insured's reserved right. They do not deny that the death of the beneficiary also works a divestiture. Therefore the term "vested interest" is inappropriate. It confuses the distinction between the revocable and irrevocable forms of designation.

If the insured does not reserve the right to revoke or change his beneficiary, though the policy may not specifically so state, then the beneficiary immediately receives a vested interest in the policy proceeds and in the exercise of all policy privileges unless otherwise limited. This vested interest is a property right and therefore could logically be expected to pass at common law to his representatives if he predeceases the insured unless the policy provides for reversion of rights to the insured, as most current policies do. Courts have divided on this point and the better reasoned rule and weight of authority seems to be that the in-

sured should have the right to terminate the deceased beneficiary's interest by a new designation, failing which the estate of the deceased beneficiary retains the interest unless it was originally conditioned on survivorship as many current policies are.

Our readers may be surprised to learn or be reminded that the English common law never has had and does not now have any principle of law by which a beneficiary of a life insurance policy can acquire a contract right to collect the proceeds for his own use. This is the subject of an interesting paper read on May 2, 1949, before the Association of Life Insurance Counsel at Hot Springs, Virginia, by Wilson E. McLean, K. C., of Toronto, entitled "A Brief Comparison of Development of Beneficiaries' Rights Under American and Canadian Law." He points out that the difficulty has lain in the fact that the beneficiary is a donee, a third party, hence a stranger to the contract because he can show no consideration moving from himself to either the promisor insurer or the promisee insured. This was essential under English common law for the conferring of any rights under contract. Of course Canada and the United States adopted the English common law and thereby inherited this principle, but fortunately the United States did not adhere to it in developing its life insurance law. Apparently Scotland and the continental countries led the way with the fiction of *jus quaesitum tertio*. It would be an interesting study to investigate the reasoning. After some changes of mind, Canada still retains the old rule in its common law but has largely overcome the difficulty and given life insurance the stimulation and assistance it certainly deserved, by enacting the Uniform Life Insurance Law in the Provinces. It first established only the rights of the preferred beneficiary, but in 1946 was extended to the ordinary beneficiary. Mr. McLean says the development of the American law was reported in 1936 by the State of New York Law Revision Committee with the conclusion that a third party has a remedy in the action of assumpsit to enforce the promise made for his benefit. He summarizes his interesting observations as follows:

> "While England, Canada and the United States started out with certain common legal principles the American Courts, when faced with the problem of the beneficiary under a life insurance policy, by applying certain of those principles evolved, by fiction or otherwise, enforceable rights in the beneficiary, whereas in Canada we have those rights only by legislation after rejection thereof by the Courts. In England those rights do not today exist generally either under Common Law rules or legislation."

Mr. James Burke, lecturing last year on "Designation of Beneficiary" before the S. S. Huebner Foundation, says the early contracts of life insurance in the United States were in form and legal effect made with the beneficiary. This was accomplished by having the beneficiary join with the insured in making the application for the policy. Doubtless this device spared the early American courts much of the distress which inhibited the English courts. Mr. Burke says it was not until 1907 that American policies were made exclusively with the insured.

Now for a review of a few recent decisions to demonstrate that the modern policy is the primary source from which to seek the answer to our subject question:

Gignac vs. Columbia National, Supreme Court of Michigan, May, 1948. 32 S. W. (2d) 442.

Effect of attempted change of beneficiary from one living to one deceased. Held, attempted change was effective as a revocation.

Facts: Rival claimants—administrator of insured versus widow (second wife). The policy was issued in 1921 when insured was married to Amelia, whom he named as beneficiary. She died in 1931. He then designated his three children. Then he married Marguerite in June, 1932. He revoked the nomination of his children and substituted Marguerite, reserving the right to revoke that designation. In 1937 he executed a change of beneficiary rider wherein he revoked "the nomination of the present beneficiary" and designated as new beneficiary "Amelia M. Gignac, wife." The policy contained a provision that, if no beneficiary survived the insured, the proceeds should be payable to his executors or administrator.

The trial court held that the 1937 rider effectively revoked the designation of Marguerite but that, since the person named as beneficiary did not survive the insured, in fact was not living when designated, the proceeds should be payable to the plaintiff, administrator of the insured.

On appeal the appellant, Marguerite, contended that the insured intended only one thing by executing the rider in 1937, namely to *change* the beneficiary, and that it was impossible to give effect to this intent because the person to be substituted was deceased. Therefore, the rider was ineffective for any purpose.

Held: The Supreme Court disagreed, holding that the rider was effective as a revocation of the designation of Marguerite as beneficiary, basing its decision on the rule of a group of Minnesota decisions to the effect that an attempt to change the beneficiary to one ineligible is at least effective as a revocation of the previous designation. It rejected the contrary rule of the decisions of Illinois, Kentucky, Virginia and Wisconsin courts. It also held inapplicable and quite properly such rules as:

(1) Where the attempt to change fails because of mental incapacity, the original designation remains in force.

(2) Where the insured intended to make a change but did nothing to carry it out, there was no change or revocation.

(3) There was no change or revocation where the insured failed to substantially comply with policy provisions for changing the beneficiary.

Matter of Estate of Neuman J. Diedrich (California Superior Court, January, 1949) 13 L. C. 658.

Mr. Diedrich procured a policy of insurance on his own life and named his wife, Phoebe, as beneficiary. It provided that the right to change was reserved and that "in the event of the death of the beneficiary before the insured, the interest of such beneficiary shall vest in the insured." Phoebe died first, leaving a will disposing of her entire estate, consisting in part of a one-half interest in the community property of her husband. All premiums on the policy were paid by the husband from the community assets. Personal representatives of each party claimed the entire proceeds. The court readily decided there was no question but that half of the proceeds belonged to the wife's estate by reason of her community interest in the funds from which the premiums for the policy were paid.

As to the other half of the proceeds purchased from the husband's community interest in the funds from which the premiums were paid, the policy provision, vesting the predeceasing beneficiary's interest in him, applied. The court observed that, if the husband had named his wife beneficiary without qualification, her estate would have been entitled to the share we call, for convenience, his half, upon the theory of unqualified gift. If, after naming his wife, he qualified his gift by reserving the right to name some other, the gift to her would have been contingent. His gift was not absolute but specifically made contingent upon the wife's surviving him. This was made especially clear by the use of the word "vest."

The court distinguished the decision in *Estate of Castiagnola,* 68 Cal. App. 732. There, the policy was procured on the life of the husband, who made his wife and daughter his beneficiaries. They both predeceased him. All premiums were paid from community funds. The policy reserved the right to change beneficiaries and further provided that if the husband survived, the proceeds or share of the beneficiaries should be paid to the representatives of the husband. The court held the policy was community property and recognized the rule that he could have dealt as he pleased with his half of the proceeds of the policy, but since he did not so act the circumstances the proceeds retained their community character, although not paid until after the dissolution of the community. The court said:

> "It will not be presumed that he intended to change the character of the property from community to separate property, but it will be assumed, in the absence of contrary showing, that he merely intended to designate his general estate as successor to the proceeds."

The distinction between that decision and this lay in the difference in the contracts. One said the proceeds should be paid to the husband's personal representative; the other said they shall vest in the insured. The word "vest" is positive and definite, and indicates a present or immediate interest as distinguished from contingent one.

Horning, Co-Executor, vs. Lindsay, Admx. (U. S. Ct. of A, D. C., August, 1948) 169 Fed. (2d) 963.

This decision involved conflicting claims to the proceeds of a policy of insurance on the life of James Horning issued in 1926. The policy provided for payment to Mrs. Horning "if living; otherwise to his executors, administrators or assigns." She died

in 1946, 16 months before her husband, the insured. The rival claimants were the representatives of the estate of the insured and the estate of the beneficiary. The beneficiary's estate based its claim on statute, D. C. Code (1940), Title 35, Sec. 716, 48 Stat. 1175 c. 672, sec. 16, c.V., providing in part that

> "The lawful beneficiary . . . shall be entitled to its proceeds and avails against the creditors and representatives of the insured . . . whether or not the right to change the beneficiary is reserved or permitted and whether or not the policy is made payable to the person whose life is insured, if the beneficiary or assign shall predecease such person . . . "

This statute was construed in the well known recent highly controversial decision in *Kindelberger vs. Lincoln National* (155 Fed. (2d) 281 (1946), cert. denied 329 U. S. 803, 947), discussed and distinguished in this decision. The distinction was that in Kindelberger the policy unqualifiedly designated the wife as beneficiary. There were no words of limitation, such as in the policy in this case, viz., "if living." Consequently it was there held that the statute gave the proceeds to the beneficiary's estate *regardless of a policy provision to the contrary."*

> N. B. That decision caused much excitement among life insurance companies. Fortunately the statute was amended effective August 1, 1947 (Stat. 711 ch. 427).

In this case the court held the wife was not designated unconditionally. She was to be beneficiary only if she survived her husband. Consequently the statute did not apply because she was not "the lawful beneficiary," she was only conditionally and potentially the beneficiary, and as she predeceased him she never became the beneficiary and title to the proceeds never vested in her, but passed by the terms of the policy to the representative of the insured's estate.

Rosetti vs. Hill (U. S. C. C. A. 9th, May, 1947) 161 Fed (2d) 549.

This is an interpleader suit. Claimants are the children of the insured by a former wife, named as contingent beneficiaries, and the co-executors of the estate of the widow. The widow was named direct beneficiary. She died 39 days after the insured and before making an election as to whether to take the proceeds in a lump sum or under the terms of the policy option. The district court awarded the benefits to the contingent beneficiaries.

One section of the policy provided that

> "Upon the death of the last surviving direct beneficiary the contingent beneficiary or beneficiaries, if any, shall succeed to the interest of such direct beneficiary, *including any unpaid benefits due or to become due it."*

In deciding for the children of the insured the district court interpreted the foregoing provision to mean that they as contingent beneficiaries should take the proceeds if the proceeds had not actually been delivered to the widow before her death. The Appellate Court, on the contrary, thought that the above quoted provision referred to the respective status of the direct beneficiary and the contingent beneficiaries and what their rights, if any, will be *at the insured's death,* and that the provision simply defines the contingent beneficiaries' right to be that if there is no direct beneficiary *at the insured's death,* then the contingent beneficiaries take.

The court pointed out that the widow and direct beneficiary was living at the death of the insured and therefore had an unqualified right to the proceeds because they had vested in her at the first point of time occurring after the insured's death. The fact that she had not elected to receive them in a lump sum or in installments was of no consequence. No one else had the slightest claim to them. If the phrase in the quoted provision, "including any unpaid benefits due or to become due" was intended to mean that the proceeds should be paid to the contingent beneficiaries in these circumstances, the court said "it would have been consistent for him (the insured) to have provided that any unpaid *instalments* under the option plan should, upon the widow's death, be paid to the contingent beneficiary." It pointed out that it was otherwise provided in the policy, that "Beneficiaries may make such election (as to options) in lieu of payments in one sum . . . (and when so made) the interest of any contingent beneficiaries shall terminate." It further held that the phrase "including unpaid benefits" referred only to incidental benefits.

Mabon, Admr., vs. White, Admx. (Mississippi Supreme Court, October 6, 1947) 32 So. (2d) 191.

Lamar Life Insurance Company issued a policy on the life of Mrs. White in which her husband was named beneficiary with right of revocation. It provided that

"The death of any beneficiary . . . occurring prior to the maturing of this policy . . . *before settlement has been completed* under this policy shall terminate such deceased . . . beneficiary's right to receive . . ."

It also provided:

"If any beneficiary . . . shall die simultaneously with the insured or after death of the insured but *before receipt,* at the home office of the Company, of written proof, satisfactory to the Company, of the death of the insured, any settlement . . . shall be made with the same beneficiary . . . and in the same manner as provided in this Policy for settlement, or payment, had such direct or contingent beneficiary have predeceased the insured."

The insured and her husband were both killed in an automobile accident. He survived her for a period of about half an hour. The contest was between the representative of the estate of the insured and the representative of the estate of the beneficiary. It was held that the estate of the insured was entitled to the proceeds of the policy because the terms of the policy so provided. This is because the beneficiary's right to the proceeds was contingent upon his being alive when the claim matured as a death claim and it did not mature as a death claim by the terms of the policy until proofs of death have been filed. The decision of the lower court in favor of the representative of the estate of the beneficiary was therefore reversed.

German B. Olin, Administrator, vs. Metropolitan (Supreme Court, New York, Wyoming County, September 14, 1948) (not yet reported).

In this case the insured's wife, Sarah M. Butler, was designated irrevocable beneficiary by Ward M. Butler, the insured. The policy provided that if the beneficiary died before the insured, the interest of such beneficiary would vest in the insured. It was established at the trial that the insured murdered the beneficiary and committed suicide immedaitely theerafter. By the nature of the two deaths there is no question but that the insured survived the beneficiary. There was also evidence that the insured was insane at the time of the murder. The contest was between the company and the administrator of the insured—the legal representatives of the beneficiaries not being parties to the action. Judge Knowles held that the administrator was entitled to recover the proceeds due under the policy because the insured was insane and not legally chargeable with the consequences of and liability for his act at the time he killed his wife. He further held that the principles of law as established in *Riggs vs. Palmer,* 115 N. Y. 506, and *Smith vs. Metropolitan,* 125 Miscellaneous 670, were inapplicable because of the insured's insanity at the time of the killing.

THE NON-WAIVER CLAUSE

Insurance companies often find themselves faced with the question of whether they are bound by the unauthorized representations of one of their agents, which representations have resulted in failure of the insured to meet certain required conditions in the policy. For example, it is a usual condition in life insurance policies that the insured be in good health and have given honest answers to questions regarding his medical history and that premiums be paid within a specified period. Because the companies are perhaps aware that their agents may expressly or impliedly lead the insured to believe that certain conditions have been satisfied, they have included in the policies a so-called "non-waiver" clause, which clause in its usual form, provides in effect that no agent of the company shall have the authority to alter or make contracts or to waive any provisions of the policy.

In the case of *Kentucky Central Life Insurance Co. vs. Lynn,* (Ky. Court of Appeals, 1947) 200 S. W. (2) 946, the insured had stated in his application for life insurance that he had not had any illness or disease during the prior three years, and that he had never had diabetes. The insured died of diabetes within six months of the policy's issue, a disease which the beneficiary-father admitted the insured had during a period of more than a year before the date of the application. The beneficiary claimed that the insurer's soliciting agents had been told the truth about the insured's diabetic condition, but that these agents themselves wrote the false answers

into the application. The court found for the insurer, and held in effect that the non-waiver clause must be considered as binding and that the contract could not be modified except by an endorsement thereon signed by the insurer's president or secretary, as provided in the clause (also see: *Martin vs. John Hancock Mut. Life Ins. Co.,* 1936, Mich., 269 N. W. 162).

However, other courts have given different interpretations to this policy clause, or at least the net result of their decisions has been to give such clause an entirely contrary effect. Some courts base their decisions upon the reasoning that knowledge of facts made known to the agent while acting for the insurer must be imputed to the insurer. The courts usually give additional support to their decision in behalf of recovery on this basis, by the further reasoning that because the insurer has knowledge of the facts, the subsequent issuing of the policy, implies an agreement by the insurer to perform upon the terms which the agent presumably discussed with the insured. See: *Atlas Life Ins. Co. vs. Chastain* (1946) Okla. 178 Pac. (2) 109; *Nat'l. Life Ass'n. vs. Clinton* (1935), Okla. 55 Pac. (2) 781; *O'Connor vs. Metropolitan Life Ins. Co.,* (1936 Conn.) 186 Atl. 618; but see *Home Ins. Co. vs. Lake Dallas Gin Co.* (1936, Tex.) 93 S. W. (2) 388. It will also be noted from these cases that the courts may hold, instead, that because the insurer does have knowledge of the facts, it is estopped to set up the condition as a defense or has in effect waived the condition, and that the non-waiver provision will not change the picture in this regard. Also see: *Prudential Ins. Co. vs. Saxe* (1943) 134 F. (2) 16, 319 U. S. 745.

Other decisions appear to be based upon the type and scope of authority which the agent has. It would seem that, in general, these courts permit the insured to recover if the agent was a general agent (those agents who have authority to issue policies), but if the agent's authority does not include within its scope the power to make contracts, the courts usually deny recovery. However, this rule is not without its exceptions and qualifications, and is based upon varying principles of the fundamental law of agency and contracts. *Liverpool & London Ins. Co. vs. Delaney* (1941 Miss.) 200 So. 440; *Ullendalen vs. U. S. Ins. Co.,* (1946, N. D.) 23 N. W. (2) 856; *Cunn vs. Minnesota Mut. Life Ins. Co.* (1944, Ill. App.) 54 N. E. (2) 596; *Lattner vs. Federal Ins. Co.,* (1945, Kas.) 163 Pac. (2) 389; *New York Life Ins. Co. vs. Rogers* (1942, 9th Cir.) 126 F. (2) 784; for a qualification of this rule see *Atlas Life Ins. Co. vs. Unger* (1947, Okla.) 177 P. (2) 98.

Other courts rely upon the parol evidence rule in order to establish a basis for denial of recovery by the insured. See: *Northern Assurance Co. vs. Grand View Ass'n.* (1902) 183 U. S. 308. Because most agent-insured discussions take place prior to, or contemporaneously with, the making of the contract, the application of the parol evidence rule offers a strong defense for the insurer, and it would seem that any acts of the agent indicating a change in the contract would not seriously affect the application of the rule. In other words, according to this view of the courts, the printed policy form constitutes the entire contract, and neither the non-waiver clause nor the agent's acts play any great or determinative part in the results.

But, to sum up, it would appear that the majority of the courts have been willing to give some recognition to the non-waiver provision, and to hold that the provision is to be considered only as notice to the insured of a limitation upon the agent's authority. This is more in keeping with the commonly accepted view and is the rule which the court in the *Lynch* case (discussed at the beginning of this article) in effect adopted. See also: *Metropolitan Life Ins. Co. vs. Coddington,* (1942, N. J. Eq.) 26 Atl. (2) 41; *Commonwealth Life Ins. Co. vs. Bruner* (1945, Ky.) 185 S. W. (2) 408; and cases cited therein.

Respectfully submitted,

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Workmen's Compensation Committee Report
Rehabilitation of the Industrially Injured

PRIOR to the passage of the first state compensation law in 1911, an injured worker, in order to collect benefits for disability or to recover the cost of his medical treatment from his employer, had to be prepared to prove that his employer was negligent, that he himself was not, that he had not assumed the risk of such an injury when he was employed and that the accident was not caused by a fellow worker. This made the procurement of benefits for injury difficult and thousands of injured workers and their families suffered hardship due to loss of wages during disability.

The primary purpose of the passage of compensation laws was to relieve this family hardship and to provide some benefits to workers in lieu of their loss of wages regardless of whose negligence caused the accident. All compensation laws were designed to include payment for some medical services, but this was secondary, and in numerous cases the period for which medical benefits were provided was as short as two weeks following injury regardless of the seriousness of the injury.

Since their passage workmen's compensation laws have been more frequently amended than any of our social laws. Virtually all of the amendments have been to increase the benefits or to broaden the scope of the law. The amounts of weekly indemnity have been increased and the period for payments have been lengthened. Occupational diseases have been included.

The greatest fundamental change, however, has been made in increasing the amounts allowable for medical and hospital care.

The Michigan Workmen's Compensation Act is illustrative of the national trend.

When the first Workmen's Compensation Act was passed in Michigan in 1912 the employer was under a duty to furnish reasonable medical, surgical, hospital services and medicines, for the first three weeks after the injury. In 1919 the period was increased to ninety days. In 1943 the employer's duty was enlarged to provide for reasonable medical, surgical, hospital service and medicines for the first six months after the injury with an additional six months' medical service upon written request and showing of necessity by the injured employee.

In 1945 the Act was further amended to provide the injured employee with dental service, crutches, artificial limbs, eyes, teeth, eye glasses, hearing apparatus and other similar appliances. The Act was further amended in 1949 to provide for three additional six month periods of medical care after the expiration of the first six months, which for practical purposes means unlimited medical care.

Under some laws medical care is now provided for as long as it is needed, for life, if necessary.

Despite the general adequacy of the medical and hospital care provisions of the Compensation Acts, there still remains the problem of the rehabilitation of the industrially injured.

When James L. Hill, Chairman of the Workmen's Compensation Commission of Michigan, was asked what in his opinion was the most pressing problem in the Workmen's Compensation field, he stated he believed it to be the problem of rehabilitating the industrially injured.

This problem was brought into focus at the conference of the International Association of Industrial Accident Boards and Commissions' Conference at Winston-Salem, North Carolina in November of 1945. On the last afternoon of the meeting a symposium and demonstration was held on the method of evaluating the percentage of permanent physical impairment.

A number of the leading surgeons and orthopedists of the state brought in for demonstration one or more of the cases that they had been treating. These cases were largely serious fracture cases involving injuries to hands, feet, arms and legs which had resulted in considerable deformities, stiffness in joints and loss of use of the members. The doctors had their patients partially disrobe, the injuries were described and the deformities and loss of function were demonstrated. It was of particular interest that in many instances where a patient had largely lost the motion of a wrist, ankle, elbow, shoulder or hip, that there had been no injury to that specific part in the accident and no pathology within the particular joint. The loss of motion was due to the long period of time that the patient had had that part enclosed in a cast or had had the joint immobolized be-

cause the member had been in a sling, splint, or some other device.

At the present time, through improved knowledge, such impairments following treatment are being eliminated. But the example is important for it indicates that the first step towards returning a severely injured worker to gainful employment is to provide medical attention that will refit him physically as far as possible. The aim of industrial rehabilitation is the restoration of the disabled to some useful and remunerative occupation, so that they can become productive members of society, but this represents only the final step. In the beginning, skilled and unstinting medical attention is necessary.

The compensation acts of most states specify the maximum amount of money to be spent on medical, surgical and hospital services, or the maximum length of time treatment should be extended. Most compensation acts also specify whether the worker, the employer or the insurance carrier has the choice of physician.

Insurance companies early recognized the fact that the first step towards returning an injured man to employment is to restore him physically as far as possible. Several years ago the Association of Casualty and Surety Companies, an organization representative of 71 capital stock insurance companies, issued a "Statement of Principles," the third principle of which states, "The best medical and surgical attention possible should be provided in those states whose laws permit the carriers to select the physician and surgeon. The insurer's object and that of the injured man are identical in this respect. By receiving the best medical care, the worker in the average case, will be rehabilitated and returned to full earning capacity more promptly. The physician should never feel that he must "favor" the carrier in order to retain its business."

It is understandable that much of the interest associated with financing of rehabilitation has been focused on insurance, for the underwriting of costs for the treating and rehabilitating of the industrially injured has largely been an insurance responsibility. It is a responsibility, incidentally, that has often exceeded the limits prescribed by law in an effort to be of the maximum service to the injured worker, for progressive companies believe "liberality is the best policy." This is not based on sentimentality, but common sense. Although the expenses over a period of time, including fees for a first-rate specialist, will be high, and may be greater than a state compensation act specifies, the increased chances of the patient's recovery compensate for the greater expense. This is so because weekly compensation payments during the lifetime of a crippled worker can amount to a very sizeable sum—and an unsatisfactory situation for all concerned.

The successful treatment of a worker's injuries, of course, is directly proportional to the skill of the physician and surgeon. In those states where the employer or his insurance carrier is permitted to make the choice of the medical specialist, the injured worker can be more than reasonably certain that the best of medical talent will be secured to treat his injuries, for it is not only humane but practical to do so. The value, to the carrier as well as to the injured employee, of correct diagnosis and expert treatment is indicated by the following case history.

Case No. 3c21574 (New York). A fractured thigh suffered by a fifty-three year old employee, was treated by a surgeon selected by the injured man, in accordance with the provisions of the New York State Compensation Act. However, because of a previous injury to the injured's knee joint, and an incorrect diagnosis by the surgeon, the fracture did not mend. In fact, the patient's condition became worse. The surgeon performed an operation to correct the previous condition, but no improvement occurred and the injured then turned to the insurance company for recommendations as to further treatment. He was sent to an outstanding specialist who performed another operation. This time, it was reasonably successful and the injured has recovered sufficiently to date, to walk with the aid of braces and crutches. He has been rehabilitated to the point where he is now employed.

It can be safely said that there is general recognition—on the part of employers, insurance carriers, private agencies and some of the States—of the the need for prompt, able and often unstinting medical attention for the industrially injured as the first step towards their rehabilitation. The approach to this objective is being accomplished in many ways; each has its advantages and, of course, its disadvantages. However, a discussion of the comparative qualities of the programs involved will not be

undertaken here, for it is beyond the scope of this article.

Some large insurance companies have established rehabilitation centers and clinics which are intended primarily to provide treatment in the "after care" period following surgery. Some companies use facilities, such as the Curative Work Shop and the New York University, Bellevue Medical Center, mentioned later in this report. Other companies have their own hospitals geared entirely to the treatment of industrial injuries and rehabilitation following surgery. Another company conducts regional medical conferences each year, at which rehabilitation is an important item.

Those companies which have their own centers and hospitals found that treatment in the "after care" period has not kept pace with the progress made in the surgical treatment, with the result that many of the gains made in the field of surgery were nullified by the lack of facilities to provide adequate "after care."

It was found that following an accident or after surgery had been performed, an individual could not be expected to rehabilitate himself. He needed convalescent medical supervision to make certain that everything was being done, not only to restore his joint function and muscle power, but also morale. It was found that special facilities where physiotherapy and occupational therapy could be given were necessary. Few doctor's offices, or even the larger hospitals had such facilities. Without constant medical supervision and without supervised re-training and without occupational therapy, surgery, no matter how brilliantly performed, was all too often doomed to failure.

Physicians caring for injured employees covered by the insurance companies maintaining these clinics were invited to refer such cases to the clinics if convalescence permitted. Progress reports were sent to referring physicians at regular intervals. Patients reported to their physicians for examination and recommendation as to further treatment. If surgery became necessary in the course of treatment, the patient was referred back to his own physician.

The tremendous advantage of constant supervision of treatment all day long, five days a week, was well indicated in the results obtained at one of these rehabilitation centers. It was found, from a statistical study of 797 cases, that 85% were definitely improved by treatment, while 15% were not improved by treatment; and that of the 673 cases involved, 434 or 64% were restored to work ability.

In the cases studied at this center, an average of seven months elapsed from the date of injury to admission, and the average age level was 47 years.

Futhermore, had these patients been referred to treatment as soon as they were ambulatory, it was found that more could have undoubtedly been returned to work and in a shorter period of time than the average of forty-two days.

Many insurance companies prefer, when they are permitted to make selection of physicians, to send their industrially injured claimants to the outstanding specialists who are located relatively close to the injured's home. This eliminates the need for moving an injured worker long distances to the company's rehabilitation clinic and permits him to remain close to his family. Such a procedure also enables the company to refer the injured, when possible, to the professional rehabilitation clinics and agencies, such as the Institute for the Crippled and Disabled in New York, and the Curative Workshop in Milwaukee. The latter agency and others will be described later in this article. Some companies, too, in those states which permit such practice, have established physical therapy departments and dispensaries staffed by highly qualified professional personnel. In addition, company physicians from the home office make regular trips to the field to closely observe the progress in serious cases.

Whatever an insurance company's methods of achieving the rehabilitation of the industrially injured might be, the objective of each company is identical; the restoration of the injured to physical, mental and occupational levels as nearly equivalent to those he enjoyed before his injury as possible. There can be no disputing this with reason.

As stated earlier, some communities have established their own rehabilitation centers. One of the first of these centers was established in Milwaukee in 1919, being known as the Curative Workshop of Milwaukee. It started in a small portable building on a budget of $2,000.00. Its great usefulness is demonstrated by the fact that 433 physicians treated 20,000 patients in 1947. The operating cost was $76,000.00 in 1947, of which 65% was earned through fees for treatment paid for by patients and by the selling of treatment service to in-

surance companies, to self-insured industrial plants, the Veterans' Administration, the Foundation for Infantile Paralysis and the State Department of Rehabilitation. Over 1200 patients were returned to normal activity, work or school, at an average cost of $39.00.

The patients referred by physicians, who prescribe and direct treatment, represented a cross section of the community from the wealthy to those on small pensions or on relief, yet the greater number were people of moderate means. Those who are financially able to do so, pay the total cost of their treatment and for others the charge is adjusted or cancelled on the basis of a financial study. Community Fund money is used to cover the cost of treating those unable to pay.

The Curative Workshop is interested in the physical, emotional, social and economic rehabilitation of its patients. To treat the physical disability without consideration of the many other needs is believed to be short-sighted and ineffectual. The policy has been to use the existing special services in the community for supplementary treatment and adjustment of the patient rather than attempting to duplicate such special services under the roof of the Curative Workshop.

The services available in the Curative Workshop clinic include medical social service, physical therapy, occupational therapy and speech therapy. Patients are referred to other community agencies for more general social case work, psychiatric service, mental testing, vocational testing and advisement, vocational training, sheltered employment and recreation. The use of other community services prevents costly duplication.

In addition to the clinic, the Curative Workshop serves in their homes those patients for whom preparatory treatment or adjustment is needed before transfer to the Workshop clinic for those who can better be treated at home. The clinic and home service departments are closely coordinated and each supplements the other in a unified treatment program which meets the many individual needs of the patient.

The New York University Bellevue Medical Center has recently established an Institute of Rehabilitation under the leadership of Dr. Howard A. Rusk, late of the Air Force Rehabilitation Service. Under his leadership, with the cooperation of the Commissioner of Hospitals, the first complete rehabilitation program in a civilian general hospital was established. In June 1948 the doors of the rehabilitation center were formally opened and its program instituted with its present capacity of forty bed patients and about 200 out patients daily. The institute is doing so splendid a job that, without question, it could care for many more patients than it now does when facilities to do so are made available.

Already among the institute's graduate "trainees" are scores of once-crippled coal miners, a bed-ridden girl from Tennessee who took her first step in six years at the Institute, and hundreds of others from virtually every section of the country.

Equally significant, perhaps, is the number of physicians who come to the Institute to study its methods to prepare to go out to other communities to set up similar programs. Today, medical personnel trained or indoctrinated at the Institute are assisting in rehabilitation programs in some fifty communities, not only in this country but in Venezuela, Palestine, Puerto Rico, Poland, Australia, and others.

The work that is being done in this country and Canada in the field of rehabilitation effectively demonstrates that much of the functional loss which we have seen in workmen's compensation cases can be avoided if methods of physical restoration treatment are applied during and following the surgical treatment of these injuries.

In a work so important as rehabilitation, it is unfortunate that certain misrepresentations and ill-founded rumors have been spread and believed to the point that the employment of the disabled has been hampered.. A story, not so popular now as it once was, but which is still frequently heard, is that workmen's compensation insurance carriers are opposed to the hiring of the impaired. Nothing could be farther from the truth, for the mental or physical quality of personnel hired by an employer, in no way affects workmen's compensation insurance rates.

The National Association of Mutual Casualty Companies, with 21 mutual casualty companies as members, has advocated and encouraged the reemployment of handicapped men and women, and has helped many policy holders to develop a program for their placement. In addition, it produced for the American Legion a sound motion picture "No Help Wanted" which

was dedicated to the proposition that disabled veterans and other persons with physical handicaps were employable and that their employment is consistent with sound insurance principles. The commercial theater version of the picture has been presented before audiences in excess of fifteen million, and has had more than 3500 showings before clubs, safety and personnel meetings and other interested groups in the 16 mm. version.

The Association of Casualty and Surety Companies, has gone on record by stating that workmen's compensation insurance carriers are emphatically not against the employment of handicapped workers. A publication "The Physically Impaired Can Be Insured Without Penalty" explaining this stand, has been distributed throughout the nation in a quantity exceeding half a million copies. In addition, the Association has conducted research, both in its Accident Prevention Department and at the Center for Safety Education, New York University, which it endows, that demonstrates the impaired can be successfully hired. The results of these studies have indicated that when properly placed, the disabled are the equal or superior of the so-called normal in comparable jobs. To make the successful hiring of the impaired more assured, the Association published a booklet entitled "The Physically Impaired —A Guidebook to their Employment," which has received national attention.

The Labor Committee of the President's Committee on National Employment of Physically Handicapped Week has also committed itself to the policy that the physically handicapped should have equality of opportunity with the physically able. In their endorsement of the hiring of the physically disabled, this Committee urged:

1. That the Federal and State governments develop and maintain systems of vocational rehabilitation adequate to serve the handicapped efficiently and effectively and to fit them for employment;
2. That employers, both public and private, hire the handicapped for all types of employment for which they are fitted by their training and abilities, and at wages and under conditions which place them on a plane of equality with all other workers; and
3. That local unions, in their agreements with management, give special recognition to the problems of the handicapped and make necessary arrangements to safeguard their rights and guarantee them equal treatment.

The attitude of the employer on the hiring of the handicapped worker has been divided. Such great industries as the Ford Motor Company, Western Electric Company, Caterpillar Tractor, Eastman Kodak Company, Marshall Field, Bulova Watch Company, Otis Elevator Company, International Business Machine, Goodyear Tire and Rubber Company and the aircraft plants have for many years employed substantial numbers of men and women with physical impairments that run the gamut of disabilities.

Until the last few years, however, there has been a tendency to decline to hire handicapped workers because of the erroneous assumptions that the hiring of such workers increases insurance costs and that they are less efficient and more accident prone.

There is no foundation for either assumption. Workmen's Compensation rates are determined by two general factors: the regular hazards in a company's work, and its accident experience. The formulae for determining the premium rates make no inquiry of the kind of personnel hired. The insurance contract says nothing, implied or direct, about the physical condition of the workers an assured may hire.

The assumption that handicapped workers are less efficient and more accident prone has been effectively answered by a recent study of the U. S. Department of Labor in cooperation with the Veterans Administration. A two year study of the actual work records of 11,000 physically impaired workers and 18,000 matched unimpaired workers in 109 plants was made. Only workers with serious handicaps were matched against unimpaired workers performing identical tasks. The survey standards were strict. They demanded that workers listed as handicapped must have suffered at least 50% disability in one or more of the nine types of impairments studied. Workers with orthopedic impairments, for instance, were not included unless at least one limb was either lost or fifty per cent useless. Other types of impairment included in the survey were vision, hearing, hernia, cardiac, arrested tuberculosis, diabetes, epilepsy, and peptic ulcers. A significant number of the handicapped workers had two or more of these impairments.

Against such physical odds, the handi-

capped workers proved that, when properly placed:

They were more efficient—According to individual output records for both groups, the relative efficiency was 101 for the impaired as against 100 for the unimpaired. Although the difference was not large, it demonstrated that impaired workers, at the least, could hold their own on the production line.

They are stable—Handicapped workers, when placed on a job where their abilities are fully recognized and utilized, are as stable as their unimpaired fellows. All too frequently, however, handicapped workers are among the first to be let out when reductions in force are ordered. They tend to seek employment which offers security of tenure. Nevertheless, the voluntary quit rate showed no significant difference between impaired workers and able-bodied workers.

They are reliable—The physically impaired and unimpaired workers have virtually the same attendance records. In the course of a year, even the seriously impaired workers covered by the survey were absent from the job only one day per year more than their unimpaired fellows.

They are careful—The record for disabling injuries, i.e., injuries that result in death, permanent impairment, or absence from work for at least one full day, was better for the physically impaired than for other workers. Whereas the unimpaired group averaged 9.6 injuries per million hours worked, the impaired group averaged only 8.9. They also averaged a slightly lower number of days lost per injury.

They are versatile—They are able to do any kind of work—from the unskilled job to the most exacting professional, business and mechanical tasks—and they are now filling these jobs in all forms of industrial and business activity.

It was found that every job in the dictionary of occupational titles is considered a suitable job for persons with some degree of handicap.

The British Government has attempted to solve this problem by legislation. In 1944 the Great Britain Disabled Persons Act was passed. This act required:

(1) Registration of all disabled persons in the labor force, both employed and unemployed.

(2) Establishment of Standard Percentage Quotas of handicapped workers to be employed by different establishments in which the total work force consists of a stipulated number of workers.

(3) Reservation of certain types of employment, such as elevator operators and parking lot attendants, exclusively for handicapped persons.

(4) Provisions for job preference for disabled veterans, whether or not disability is service connected.

Howard A. Rusk and Eugene J. Taylor in an article entitled "Employment for the Disabled" in the 1948 fall edition of Social Issues, have this to say:

"Although reports reaching this country on the success of the British Plan are conflicting, and undoubtedly sufficient time has not elapsed for a completely objective analysis to be made of its long-range implications, there are many persons concerned with rehabilitation and services to the handicapped in this country, such as the writers, who believe the British plan represents the wrong philosophical approach to the problems of the handicapped of this country.

"The use of compulsory employment quotas in industry and the reservation of certain types of employment exclusively for the handicapped, places a premium on disability rather than ability. The motivation so necessary for rehabilitation and social readjustment of the handicapped could easily be lost and the guarantee of employment might be used as a crutch to impede the process of the patient's improvement or recovery, since it lays no stress upon the healthy motivation supplied by personal incentive."

How have the Workmen's Compensation laws attempted to meet the problem of the handicapped employee?

All workmen's compensation acts adhere to two fundamental concepts:

(a) The employer is responsible for the worker in the condition in which he was hired;

(b) The employer is responsible for any accident on the job or any working condition which aggravated conditions already present when the worker was hired.

As a result of these principles, many employers avoided employment of handicapped persons, fearful that their accident rate would be greater and that their period of recovery would be longer.

To encourage the employment of handicapped persons in industry, legislation has

been passed along two general principles:

(a) Waivers,
(b) Second injury funds.

Waivers, however, never became a popular method of dealing with the problem of encouraging employment of handicapped persons—being contrary to the fundamental principles of employer responsibility.

Second injury fund proposals have been of two kinds.

Some states, such as New York, provide that the employer is responsible for the first 104 weeks' disability in a second injury case and a special fund takes care of any expense beyond that. The disability then, over 104 weeks, is not charged against the experience rating of the firm. The special fund is accumulated by setting on all industry a one percent tax based on the previous year's experience rating.

Other states have laws which provide that if the employee has at the time of the injury permanent disability in the form of the loss of hand or arm or foot or leg or eye, and at the time of such injury incurs further permanent disability in the form of a loss of a hand or arm or foot or leg or eye, he shall be deemed to be totally and permanently disabled and the employer is responsible for the cost of the second injury, the second injury fund compensating the worker for the difference between this amount and the amount due the worker for permanent, total disability.

As pointed out earlier, the employer's responsibility to the handicapped worker is being recognized also by legislation increasing medical care for the injured workman. At the same time, there has been a trend to increase indemnity and reward for disablement.

How do these factors—generosity of indemnity and reward for impairment and amount of medical benefits—tend to encourage or discourage rehabilitation efforts of the employer or insurance carrier?

To answer this question, some analysis of present workmen's compensation laws must be made.

State laws provide disability indemnity varying from 50% of wages to 70%, with maximum weekly payments ranging from $16.00 to $38.00, with a few states adding more when there are dependents. Payments for total disability run from a low minimum of $5.00 in one state to payment for the entire period or as long as the injured person lives. Seventeen states provide for the full period of disability.

A feature of compensation laws which has an important bearing on rehabilitation is what are called schedule awards for loss by amputation of parts or permanent loss of use of body parts. Some states provide schedule awards for loss of fingers, toes, hands, feet, arms, legs, sight and hearing, which are paid in addition to payments for disability, while in other states the payments are more generous and are made in lieu of payments for disability. In a third group of states, the payments are based on a combination of disability and schedule awards for the particular injury.

In twelve states, fixed amounts are paid for permanent injury or loss of body parts which means that no saving can be made by rehabilitating the individual. The incentive to provide rehabilitation on the part of the employer or insurer is thereby reduced.

In eighteen of the states certain serious injuries, such as the loss of both eyes, both hands, both feet or any two such members, are adjudged to be total, permanent injuries, and awards for maximum payments are made regardless of whether the injured is rehabilitated and restored to earning capacity or not. Loss of use, or paralysis of a part is usually considered the loss of the part.

With regard to the extent of medical benefits now provided, in nineteen states either the period covered, the amount to be paid, or both, are unlimited; and in most states the amounts are quite generous. In only a few states is the period still limited to a matter of two to four months and amounts as low as $200.00 to $500.00. In thirty-seven states, artificial appliances are provided.

In addition to accepting the provision of the Federal Vocational Rehabilitation Act, fifteen states have made some specific provision for a fund for rehabilitation of industrially disabled, or have provided special maintenance allowances while in training.

In summarizing these provisions of compensation laws for the purpose of analyzing their influence upon the rehabilitation of the industrially disabled, we find that there are three types of benefits payments provided:

First, weekly indemnity payments for disability from performing work. *Second,* schedule award payments for loss of or loss of use of body parts, even up to payment for life for loss of two or more major body

parts. These are the so-called reward payments. *Third,* payment for medical and hospital services, artificial appliances and rehabilitation services.

The payment for disability is a fundamental concept in the system.. It fills an acute need and the occasional malingerer does not change this concept that a reasonable payment of indemnity should be made during disability to maintain morale and relieve suffering. The payment of medical and hospital services is also fundamental as care and return to productive employment cannot be had without adequate medical treatment services and appliances.

Schedule awards and reward payments we do not consider as fundamental. They work against the stimulation of the injured to seek rehabilitation, and if they must be paid despite the individual's ability to perform work, they work against the stimulation of the employer or insurer to provide rehabilitation services. Because they constitute a part of the benefit structure of workmen's compensation, it would be difficult to remove them. They are considered a part of the social gain which has been made in the development of these laws. To some students of rehabilitation, they appear outmoded because psychologically they work against the best interest of the injured worker. As a result of modern developments in medicine and rehabilitation services, we know that virtually all cases of physical injury, regardless of severity, are capable of being restored in some form of work capacity. We know that a blind man is not necessarily totally and permanently disabled. Neither is a person necessarily totally and permanently disabled who has lost both hands, or whose legs may be paralyzed.

It would seem desirable, therefore, that there be a more intensive study of the idea that the interest of the injured worker would be better served if payments now dispensed as schedule or reward benefits could be applied to the extension of payment for disability in states where those benefits are limited or to increasing the period for payment for medical services where such payments are limited. Instead of allowing special awards for certain injuries, awards for special rehabilitation services might be granted. In this way, the over-all benefit level of compensation provided would not be lowered, and the interest of the injured worker would be better served.

This change in the benefit system could be effected without affecting the over-all benefit level of compensation provided by the law of any state, if the study shows that the interest of the injured workers, for whose benefits the compensation laws exist, would be better served.

Your committee has found the work of preparing this report very interesting and enlightening. It has received invaluable assistance from the following members of the Association, not members of the Committee: L. J. Carey, Franklin J. Marryott, Ray Murphy, and from the following persons, not members of the Association: Miss Marjorie Taylor, Executive Director, Curative Workshop of Milwaukee; Dr. Howard A. Rusk and Mr. Eugene J. Taylor, New York University-Bellevue Medical Center, New York; Mr. B. E. Kuechle, Vice President and Claim Manager, Employers Mutual Liability Insurance Co.; Stanwood L. Hansen, Assistant Vice President, Liberty Mutual Insurance Company; James L. Hill, Chairman, Michigan Workmen's Compensation Commission; Harry A. Nelson, Director, Workmen's Compensation, Wisconsin; J. W. Brown, Assistant Chief, Vocational Rehabilitation, State of Wisconsin; E. E. Sparrow and J. Campbell, Workmen's Compensation Board, Province of Ontario; Donald E. Dickson, Director, Office of Non-Academic Personnel, University of Illinois; Carl A.. Beckstedt, Claims Manager, Liberty Mutual Insurance Company, Milwaukee; John V. Grimaldi, Director, Industrial Division, Association of Casualty and Surety Companies; E. A. Cowie, Assistant Secretary, Hartford Accident and Indemnity Co., Hartford, Connecticut; John W. Gibson, Assistant Secretary of Labor, Washington, D. C.

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Report Of Treasurer

FORREST S. SMITH, JERSEY CITY, N. J.

For the 15 month period ended October 31, 1949

AT the Convention at Bretton Woods in July, 1949, the by-laws were amended to change the fiscal year from August 1-July 31 to November 1-October 31. No final report could be given at the Bretton Woods Convention and therefore this report is being printed in the Journal.

It should be noted that, while the receipts cover only one year's dues, the disbursements cover two Conventions, five Journals and operations for 15 months.

I will be glad to discuss any aspect of the Association's finances with any member.

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

BALANCE AT JULY 31, 1948:			
Cash:			
On demand deposit	$ 6,436.71		
In savings account	3,014.50	$ 9,451.21	
United States Bonds:			
Defense Series G:			
Maturing February, 1954	$ 5,000.00		
Maturing February, 1955	10,000.00	15,000.00	$24,451.21
RECEIPTS:			
Dues	$17,722.00		
Registration fees for 1949 convention	2,650.00		
Subscriptions to Journal	433.92		
Interest	571.66		
Miscellaneous	23.32		
TOTAL		$21,400.90	
DISBURSEMENTS:			
Secretary's office expense	$ 4,201.79		
Treasurer's office expense	1,504.28		
President's office expense	107.49		
Expense for selecting committees	158.54		
Journal expense	7,774.66		
Miscellaneous	126.16		
Mid-winter meeting	4,722.69		
1948 Convention	4,593.43		
1949 Convention	5,201.31		
		28,390.35	
Excess disbursements over receipts for period			(6,989.45)
Balance exclusive of registration fees for 1950 convention			$17,461.76
Receipts of registration fees from members for 1950 convention			1,850.00
BALANCE AT OCTOBER 31, 1949			$19,311.76
ACCOUNTED FOR AS FOLLOWS:			
Cash:			
On demand deposit	$ 3,288.10		
In savings account	1,023.66	$ 4,311.76	
United States Bonds:			
Defense Series G:			
Maturing February, 1954	$ 5,000.00		
Maturing February, 1955	10,000.00	15,000.00	
			$19,311.76

We have examined the statement of cash receipts and disbursements of the International Association of Insurance Counsel, for the 15 month period ended October 31, 1949. In connection therewith we examined or tested accounting records of the Association and other supporting evidence by methods and to the extent we deemed appropriate.

In our opinion, the above statement presents fairly the recorded cash transactions of the International Association of Insurance Counsel, for the 15 month period ended October 31, 1949.

ERNST & ERNST.

New York, N. Y.
December 8, 1949.